

DOCKET

o. 83-1158-CSX	Titles	Estate of Donald E. Thornton and Connecticut Petitioners
Status: GRANTED		Vs. Caldor, Inc.
Docketed: January 11, 1984	Court:	Supreme Court of Connecticut
	Counsel for petitioners:	Lewin, Nathan
	Counsel for respondents:	Gerwitz, Paul
RTTY	Date	Note
		Proceedings and Orders
1	Nov 18 1983	Application for extension of time to file petition and order granting same until January 4, 1984 (Marshall, November 22, 1983).
2	Dec 30 1983	Application for further extension of time to file petition and order granting same until January 11, 1984 (Marshall, January 4, 1984).
3	Jan 11 1984	G Petition for writ of certiorari filed.
4	Feb 10 1984	G Motion of Connecticut for leave to intervene as a party petitioner filed.
5	Feb 10 1984	G Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
6	Feb 13 1984	Brief of respondent Caldor, Inc. in opposition filed.
7	Feb 15 1984	DISTRIBUTED. March 2, 1984
8	Feb 16 1984	X Brief amicus curiae of United States filed.
9	Mar 5 1984	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED. Justice Marshall OUT.
10	Mar 5 1984	Petition GRANTED. Justice Marshall OUT.
11	Mar 9 1984	===== DISTRIBUTED. March 10, 1984. (Motion of Connecticut for leave to intervene as party petitioner).
12	Mar 15 1984	Order extending time to file brief of petitioner on the merits until June 1, 1984.
13	Mar 19 1984	Motion of Connecticut for leave to intervene as a party petitioner GRANTED.
14	May 7 1984	G Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
15	May 21 1984	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
16	May 24 1984	G Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae filed.
17	Jun 4 1984	Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae GRANTED.
18	May 30 1984	G Motion of Anti-Defamation League of B'nai B'rith for leave to file a brief as amicus curiae filed.
19	Jun 9 1984	Motion of Seventh-day Adventist Church for leave to file a brief as amicus curiae filed.
20	Jun 9 1984	Motion of Americans United for Separation of Church and State for leave to file a brief as amicus curiae filed.
21	Jun 9 1984	Brief of petitioner Estate of Donald E. Thornton filed.

Entry	Date	Note	Proceedings and Orders
24	Jun 4 1984		Brief of Connecticut Intervenor filed.
25	Jun 7 1984		Joint appendix filed.
26	Jun 8 1984		Brief amicus curiae of United States filed.
28	Jun 9 1984		Brief amicus curiae of ACLU and the American Jewish Committee filed.
29	Jun 11 1984		Motion of Anti-Defamation League of B'nai B'rith for leave to file a brief as amicus curiae GRANTED.
30	Jun 11 1984		Motion of Seventh-day Adventist Church for leave to file a brief as amicus curiae GRANTED.
31	Jun 11 1984		Motion of Americans United for Separation of Church and State for leave to file a brief as amicus curiae GRANTED.
32	Jun 12 1984	S	Motion of Connecticut for divided argument filed.
33	Jun 15 1984	S	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
35	Jun 19 1984		Order extending time to file brief of respondent on the merits until August 3, 1984.
36	Jun 25 1984		Motion of Connecticut for divided argument GRANTED.
37	Jun 25 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
38	Jul 3 1984		Record filed.
39	Aug 3 1984		Brief amicus curiae of Equal Employment Advisory Council filed.
40	Aug 3 1984		Brief amicus curiae of Connecticut Retail Merchants Association, et al. filed.
41	Aug 3 1984		Brief of respondent Calder's, Inc. filed.
42	Aug 3 1984		Brief amicus curiae of AFL-CIO filed.
43	Aug 21 1984		CIRCULATED.
44	Aug 28 1984		SET FOR ARGUMENT, Wednesday, November 7, 1984. (4th case)
45	Oct 23 1984	X	Reply brief of petitioner Estate of Donald E. Thornton filed.
46	Oct 31 1984	X	Reply brief of petitioner State of Connecticut Intervenor filed.
47	Nov 7 1984		ARGUED.

**PETITION FOR
WRIT OF
CERTIORARI**

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FILED
JAN 11 1984
ALEXANDER L. STEVENS,
CLERK

In The
Supreme Court of the United States
October Term, 1983

ESTATE OF DONALD E. THORNTON,

Petitioner.

v.

CALDOR, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

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QUESTION PRESENTED

Whether a Connecticut statute that protects religious observers against being compelled to work on the day of the week they observe as their Sabbath violates the Establishment Clause of the First Amendment.

* There are no other parties to the action other than those listed in the title.

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No. 83-

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 1983

ESTATE OF DONALD E. THORNTON,

Petitioner,

v.

CALDOR, INC.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT**

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Appendix A, pp. 1a-18a, *infra*) is reported at 191 Conn. 336, 464 A.2d 785. The opinion of the Superior Court for the Judicial District of Hartford-New Britain (Appendix B, pp. 19a-23a, *infra*) is unreported.

JURISDICTION

The decision of the Supreme Court of Connecticut was entered on September 6, 1983. On November 22, 1983, Justice Marshall extended the time within

which to file a petition for a writ of certiorari to and including January 4, 1984 (App. C, p. 24a *infra*). On January 4, 1984, Justice Marshall further extended the time within which to file a petition for a writ of certiorari to January 11, 1984 (App. D, p. 25a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 53-303e of the Connecticut General Statutes appears, in its entirety, in footnote 1 of the opinion of the Supreme Court of Connecticut, p. 2a, *infra*.

STATEMENT

In early 1975 Donald E. Thornton accepted employment as a department manager with Caldor, Inc., the operator of a chain of New England retail stores. At that time, Caldor's Connecticut stores were closed on Sundays pursuant to Connecticut's Sunday-closing laws. Conn. Gen. Stat. §§ 53-300 to 53-303 (1975 ed.). In 1976, the Connecticut General Assembly revised the State's Sunday laws. The new statutory provisions authorized certain kinds of businesses to be open on Sundays and certain products to be sold. The law specified, however, that no employee could be required to work more than six days in any calendar week. Section 5(b) of the 1976 law (§ 53-303e)—which is at issue in this case—provided:

No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

Following enactment of this law, Caldor opened its Connecticut stores on Sundays and demanded that its employees be available to work on that day of the week. Thornton was then manager of the men's and boys' clothing department in Waterbury, and he initially acquiesced in his employer's requests, working a total of 24 Sundays in 1977 and 1978. In October 1978, he was transferred to Caldor's Torrington store, where he was manager of the men's, boys' and shoe departments. He continued to work on Sundays, as directed, during the first part of 1979, but submitted a written request in November 1979 that he be excused from work on Sundays because he observed that day as his Sabbath. Caldor executives refused to honor his request. They offered to transfer him to a Massachusetts store which was closed on Sundays or to demote him to a non-supervisory capacity, where he would receive substantially lower pay but would not be asked to work on Sundays.

Thornton rejected the transfer to Massachusetts. His supervisor then told him he would be demoted to a rank-and-file employee, thereby reducing his hourly pay from \$6.45 to \$3.50. Thornton thereupon ceased coming to work and filed a grievance with the State Board of Mediation.

The Board of Mediation held an evidentiary hearing. Its decision reported:

Mr. Thornton testified that Sunday was his Sabbath. He testified to some extent as to what he would do and would not do as an observance of his Sabbath. The panel felt that Mr. Thornton had justified to the panel, that, in fact, his Sundays were his day of Sabbath.

The Board found that, under company policy, transfers out-of-state, such as had been suggested to Thornton, "were by mutual consent of the company and the employee offered the transfer," and that it was "not a company order." The Board also rejected Caldor's claim that Thornton had voluntarily resigned when he refused to accept the non-supervisory position at the diminished salary. It held:

In the opinion of the majority of the panel, Caldor discharged Mr. Thornton as a management employee for refusing to work Sundays, which day was Mr. Thornton's day of Sabbath.

The Board of Mediation refused to consider Caldor's challenge to the constitutionality of Section 53-303(e) on the ground that, as a quasi-judicial body, it had no authority to pass on the constitutionality of the State law. By a vote of 2-to-1, the Board sustained Thornton's grievance and ordered Caldor to reinstate Thornton and to reimburse him for the lost pay and fringe benefits that he would have earned had he not been discharged.

Caldor filed a proceeding in the Hartford-New Britain Superior Court to vacate the award of the Board of Mediation pursuant to Conn. Gen. Stat. § 52-481. Thornton cross-moved to confirm the Board's award. On August 25, 1981, Caldor's application was denied and the cross-motion to confirm the award was granted. The trial judge held that Section 53-303e satisfied constitutional standards because the primary effect of the Connecticut law "is to limit the number of days which an employee may be compelled to work to six per week" (p. 21a *infra*). The judge relied on *McGowan v. Maryland*, 366 U.S. 470 (1961), as

authorizing such a law and noted that it was permissible to provide for an individually selected day of rest rather than for one common day (p. 22a, *infra*):

The statute avoids forcing all employees to conform to Sunday as a day of rest when their own religion may observe a different day as Sabbath. Thus, the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice.

The Supreme Court of Connecticut reversed, finding that Section 53-303e "does not pass constitutional muster under the strictures of the establishment clause."¹ The court held that the use of the term "Sabbath" in the law demonstrated that it had "religious overtones" and "comes with religious strings attached." The court noted that since the law had the "unmistakable purpose" of "allow[ing] those persons who wish to worship on a particular day the freedom to do so," it could not be said to have a "clear secular purpose" (pp. 12a-14a, *infra*). The court also concluded that the law conferred a benefit "on an explicitly religious basis" and thereby, in its view, infringed the "primary effect" standard of the three-part Establishment Clause test (pp. 14a-15a, *infra*). Finally, the court held that since the Board of Mediation must evaluate religious practices and religious activities in passing on a claim such as Thornton's, the law "creates excessive governmental entanglements be-

1. The court sustained the Board of Mediation's non-constitutional rulings (1) that the Board had no power to decide the constitutional question and (2) that Caldor had effectively "discharged" Thornton from his managerial position (pp. 5a-10a, *infra*).

tween church and state" (pp. 15a-16a, *infra*). On these grounds, the court below concluded that Section 53-303e(b) of the Connecticut General Statutes "is clearly violative of the establishment clause" and reversed the trial court.²

REASONS FOR GRANTING THE WRIT

1. The court below misapplied this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), when it utilized *Lemon's* three-part "cumulative criteria" (403 U.S. at 612-13) to decide whether a legislative accommodation for individual religious liberties is constitutionally permissible. The three-part test announced in *Lemon* is the appropriate constitutional yardstick for deciding whether governmental programs of financial assistance to private institutions are constitutionally permissible (e.g., *Mueller v. Allen*, 103 S. Ct. 3062 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977)) and for evaluating the constitutionality of other legislative implementations of religious doctrine or observance (e.g., *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School District v. Schempp*, 374 U.S. 203 (1963)). That test does not, however, control all Establishment Clause questions. In its recent decision in *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), for example, this Court eschewed the *Lemon v. Kurtzman* test in favor of a historical appraisal of legislative prayer and a pragmatic evaluation of whether such ceremonial acts infringe on interests protected by the First Amendment.

Legislative accommodation to the conscientious needs of individuals observing their religion is a commendable part of our country's pluralistic tradition.

2. On February 4, 1982, Thornton died. The administrator of his estate has authorized counsel to continue this action on behalf of the estate.

When such individual rights of conscience conflict with seemingly neutral obligations imposed by government, the Free Exercise Clause of the First Amendment frequently requires the State to make an exception for the religious observer. E.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board*, 450 U.S. 708 (1981). Yet under the reasoning employed by the Connecticut Supreme Court such accommodations for religion would be violative of the Establishment Clause because they would be viewed as having plainly religious purposes, having the primary effect of advancing religion, and entangling government with religion.

Legislation which is designed to safeguard individual religious observance and accommodate individual religious interests need not, under this Court's decisions, be judged by the three-part *Lemon* test. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court interpreted and applied the federal counterpart of Connecticut's law—Section 701(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j). The Court did not hold that by requiring private employers to accommodate religious observers, the federal law *ipso facto* violated the three-part *Lemon* test—a result that would have been mandated if the decision below were correct. Indeed, laws similar in design to the federal provision, protecting Sabbath observance and other religious practices against discrimination by private employers, have been enacted in a number of jurisdictions,³ and all are

3. E.g., Alaska Stat. §18.80.200(h); Ariz. Rev. Stat. Ann. §41-1481(b); Ky. Rev. Stat. §344.030(b); Mass. Gen. Laws Ann. ch. 343, §4(1A); N.H. Rev. Stat. Ann. tit. 31, §354-A:3(4) (incorporating federal law); N.Y. Executive Law §296(10); Pa. Stat. Ann. tit. 43, §955.1 (public employees); S.C. Code Ann. §1-13-30(K); Wis. Stat. Ann. §111.307.

now in jeopardy in view of the reasoning of the court below. This point was made by the Solicitor General in a recent brief filed in this Court, where he expressed "dismay" over the approach taken by the Supreme Court of Connecticut in this case and indicated that it jeopardizes laws, such as Section 701(j) of the Civil Rights Act of 1964, which do no more than create "opportunities for religious practice." Brief for the United States as Amicus Curiae, *Walence v. Jaffree*, No. 83-812, pp. 10-13 & n. 11.

Rather than invalidating such laws under the three-part *Lemon* test, this Court's decisions implementing the Free Exercise Clause support the conclusion expressed by Justice Brennan in his dissenting opinion in *Hardison* (432 U.S. at 90-91):

If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.

The correct constitutional standard by which to judge a State statute that protects religious believers and practitioners against private discrimination is the same standard under which laws prohibiting other forms of invidious discrimination are measured. Just as a State may prohibit private discrimination in private employment on account of gender, sex, age or physical handicap, it may enact legislation to prohibit discrimination on account of religious belief or observance. Under the test of rationality applied in the discrimination context, the Connecticut law, the federal statute protecting religious observers, and comparable legislation in other jurisdictions are all constitutional.

2. Even if the *Lemon* test is applied, the decision of the Supreme Court of Connecticut invalidating the State's Sabbath-observer law conflicts with decisions of federal courts which, while applying the same test, have upheld the Sabbath-observer protections of Section 701(j) of the Civil Rights Act and with decisions of State courts upholding local laws prohibiting private employers from discriminating on account of religious observance. The United States Courts of Appeals for the Sixth, Seventh and Ninth Circuits have rejected Establishment Clause challenges to Section 701(j). *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (8th Cir. 1982); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). State courts in Kentucky and Wisconsin have done the same. *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350 (Ky. Ct. App. 1982); *American Motors Corp. v. Department of Industry, Labor and Human Relations*, 93 Wis. 2d 14, 286 N.W.2d 847, 854-59 (1979).

Indeed, one federal court has viewed this issue as foreclosed by this Court's dismissal, for lack of a substantial federal question, of the appeal in *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 184 Cal. Rptr. 907, 593 P.2d 852 (1979), appeal dismissed, 444 U.S. 986 (1980). In that case, the California Supreme Court held that a provision of the California constitution prohibiting religious discrimination barred disqualifications based on observance of religious practices. The appeal to this Court was based on the Establishment Clause, and that appeal was dismissed. In the *Nottelson* opinion,

supra, 643 F.2d at 453, the Seventh Circuit held that it was "bound on this issue" by this Court's dismissal of the *Rankins* appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A DECISION OF CONNECTICUT SUPREME COURT

CALDOR, INC. v. DONALD E. THORNTON (11002)

SPERLA, C. J., PETENA, BEASLEY, SITTA and OHLAR, Js.

The plaintiff, C Co., applied to the trial court to have vacated an award of the Connecticut state board of mediation and arbitration which determined that the defendant, T, a former employee for C Co., had been discharged by C Co. in violation of the statute § 53-306a which provides, inter alia, that an employee may not be required to work on a day he states is his Sabbath and that the refusal to work on one's Sabbath is not grounds for dismissal. T, who had been dismissed when he refused to continue working on Sundays and had thereafter resigned, filed a cross application for confirmation of the award. The trial court confirmed the award upon concluding that § 53-306a was unconstitutional and that the board was correct in determining that T had been "discharged" within the meaning of § 53-306a. On C Co.'s appeal to this court, held:

1. Because the submission to the board was unconstitutional and because the board's award conformed to that submission, this court had to conclude that there was no error in the board's determination that T had been "discharged" within the meaning of § 53-306a.
2. The board did not err in refusing to decide the constitutionality of § 53-306a.

(One judge dissenting)

3. As now written § 53-306a does not have a clear secular purpose, has the primary effect of advancing religion, and creates excessive governmental entanglement with religion. It violates the establishment clause of the first amendment to the United States constitution; accordingly, the trial court should not have confirmed the award.

Argued March 29—decided September 6, 1983

Application by the plaintiff to vacate an arbitration award, and cross application by the defendant to confirm the award, brought to the Superior Court in the

Judicial District of Hartford-New Britain at Hartford and tried to the court, Brennan, J., judgment denying the application for an order vacating the award and granting the cross application for an order confirming the award, from which the plaintiff appealed to this court. Error; judgment directed.

Eliot B. Gersten, for the appellant (plaintiff).
Robert L. Fisher, Jr., for the appellee (defendant).

CARLILE, J. This appeal from the judgment of the trial court granting an application to confirm an arbitration award and concomitantly denying an application to vacate the award attacks, *inter alia*, the constitutional validity of § 53-303e of the General Statutes.¹

The underlying facts culminating in the present appeal are not in dispute. During 1978 the defendant, Donald Thornton, began working as a department manager for the plaintiff, Caldor, Inc., which operates a

¹ In its entirety, General Statute § 53-303e states: "No employer shall require an employee to calendar more than two consecutive days of work, except for Saturdays, Sundays or holidays, or consecutive Saturdays, (a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industry or process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his discharge.

"(b) No person who claims that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his discharge.

"(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

"(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

"(e) Any person who violates any provision of this section shall be fined not more than two hundred dollars."

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chain of retail department stores in Connecticut. In 1977, Caldor began opening for business on Sundays, thereby requiring the defendant and other department managers to work one out of every four Sundays. Although the defendant worked thirty-one Sundays between 1977 and 1979, in November, 1979, he informed Caldor that he would no longer work on Sunday as that day was his Sabbath.

Subsequently, the defendant had several meetings with Caldor executives in an attempt to resolve the problem. Caldor offered him two choices: (1) to continue in a supervisory capacity at a Massachusetts store, which did not require Sunday employment; (2) to remain at his current location in a nonsupervisory capacity as a member of the employee union, whose contract provided for nonattendance of work on the Sabbath. Thornton rejected both alternatives because of the distance and hardship involved in commuting or moving to Massachusetts, and because remaining in Connecticut as a union member included a decrease in pay from \$6.46 to \$3.50 per hour. When Caldor informed him, on Thursday, March 6, 1980, that there was "no alternative other than to revert you back to a rank and file at \$3.50 an hour beginning this Monday," the defendant resigned from his job with the plaintiff. His last day of work was March 8, 1980.

On May 6, 1980, the defendant appealed Caldor's actions to the Connecticut state board of mediation and arbitration (hereinafter the board) alleging wrongful discharge under General Statutes § 53-303e in that as a department manager he was unable to observe his Sabbath. The parties agreed that the issue before the board was the validity of the defendant's claim under § 53-303e. The matter was heard by the board on July 14, 1980. In a two-fold attack on the validity of the defendant's claim, the plaintiff argued that Thornton

had not been "discharged" within the meaning of the statute, and further that the statute was unconstitutional.

The board, construing its authority as "quasi judicial," concluded that it was not empowered to decide the constitutionality of the statute at issue. It therefore assumed the constitutionality of § 53-303e until a court decided otherwise. The board thereupon determined that Thornton had been "discharged" as a managerial employee in violation of § 53-303e, and issued an award in favor of the defendant.

On November 18, 1980, Caldor filed an application to vacate the arbitration award with the trial court pursuant to General Statutes § 52-418, alleging the award to be illegal and beyond the power of the arbitrators in that (1) Thornton was not "discharged" within the meaning of § 53-303e; and (2) § 53-303e was unconstitutional as a violation of the establishment clause of the first amendment to the United States constitution. The defendant subsequently filed a cross application, seeking confirmation of the arbitration award pursuant to General Statutes § 52-417. By memorandum of decision filed August 28, 1981, the trial court, *Brennen, J.*, concluded that § 53-303e did not violate the establishment clause. The court further concluded that the board was correct in finding that the defendant was discharged from his position of employment. Accordingly, the court granted the defendant's cross application to confirm the arbitration award while denying the plaintiff's application to vacate the award. From this judgment, the plaintiff has appealed.

On appeal, the plaintiff pursues its two primary claims presented before both the board and the trial court: (1) that the defendant was not "discharged" within the meaning of § 53-303e, and (2) that § 53-303e

is constitutionally infirm because the statute violates the establishment clause of the first amendment of the United States constitution.² Although we do not agree that the board exceeded its powers in determining that Caldor violated the provisions of § 53-303e, we agree with the plaintiff's contention that the statute does not pass constitutional muster under the strictures of the establishment clause.

The plaintiff first asserts that the board impermissibly exceeded its powers by finding Caldor in violation of § 53-303e. It contends that the statute refers only to "dismissal and discharge," and is therefore not applicable under the facts of the present case, which reveal that the defendant resigned his position. We find this claim unpersuasive.

It is settled law in this jurisdiction that "[a]ny challenge to an award on the ground that the arbitrator exceeded his powers is . . . properly limited to a comparison of the award with the submission." *Bruno v. Department of Consumer Protection*, 190 Conn. 14, 18, 458 A.2d 685 (1983). "Where the submission is unrestricted, 'the award is . . . final and binding and cannot be reviewed for errors of law or fact.' *Milford Employees Assn. v. Milford*, 179 Conn. 678, 683, 427 A.2d 859 (1980)." *Carroll v. Aetna Casualty & Surety Co.*, 189 Conn. 16, 19, 453 A.2d 1158 (1983). "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the sub-

² "Congress shall make no law respecting an establishment of religion" U.S. Const., amend. I. The establishment clause is applicable to the states through the fourteenth amendment. *Castwell v. Commonwealth*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

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mission is unrestricted, will they review the arbitrators' decision of the legal questions involved. *Meyers v. Lakeridge Development Co.*, 173 Conn. 133, 135, 376 A.2d 1105 [1977]. *Waterbury v. Waterbury Police Union*, 176 Conn. 401, 404, 407 A.2d 1013 (1979)."*Bic Pen Corporation v. Local No. 134, United Rubber, Cork, Linoleum & Plastic Workers of America*, 183 Conn. 579, 584, 440 A.2d 774 (1981).

Ordinarily, "[a]rbitration is a creature of contract and the parties themselves, by the terms of their submission, define the powers of the arbitrators." *Waterbury v. Waterbury Police Union*, *supra*, 403. In the present case, however, the statute itself mandates compulsory arbitration and defines the powers of the arbitrators.³ Under subsection (c) of § 53-303e, "[a]ny employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole . . ." Clearly, the language of subsection (c) empowers the board to resolve all issues arising under subsections (a) or (b), the operative provisions of § 53-303e. Moreover,

³ Although there may be a question concerning the arbitrability of disputes arising under § 53-303e in the absence of an agreement between the parties to submit to arbitration; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71, 80 S. Ct. 1343, 4 L. Ed. 2d 1408 (1960) (Brennan, J., concurring); *New Britain v. Connecticut State Board of Mediation and Arbitration*, 178 Conn. 507, 540, 424 A.2d 243 (1979); in the present case we need not reach this issue. Both parties freely submitted to arbitration pursuant to General Statutes § 53-303e (c), and nowhere in the proceedings below or on appeal to this court has either the plaintiff or the defendant challenged the arbitrability of the present dispute in light of the absence of an agreement between the parties. Under these circumstances we will consider the arbitrability issue waived. See *New Britain v. Connecticut State Board of Mediation and Arbitration*, *supra*, 540-41.

although the parties have consistently disputed the applicability of the "discharge" language within the statute to the facts of this case, they freely submitted this and all other issues concerning the validity of the defendant's claim under § 53-303e to the board, which entered its decision in favor of the plaintiff. The submission can only be construed as unrestricted.

The plaintiff, by alleging error in the construction of the scope of § 53-303e, "effectively seeks a second determination of the underlying dispute on the merits." *Carroll v. Aetna Casualty & Surety Co.*, *supra*, 23. Such a claim, regardless of whether it is construed as an attack on the factual or legal conclusions of the arbitrators, is "outside the permissible scope of judicial review." *Bruno v. Department of Consumer Protection*, *supra*, 20. When there is an unrestricted submission, the award need only conform thereto. The record before us clearly reveals that it did.⁴

Since the limited scope of judicial review accorded arbitration awards compels us to conclude that there was no error in the board's determination with regard to discharge, we turn to a consideration of the plaintiff's claim that § 53-303e is unconstitutional. See *State v. DellaCamera*, 166 Conn. 557, 560-61, 353 A.2d 750 (1974).

Our threshold inquiry is directed toward whether it was incumbent upon the board to consider the constitutional issue. The unrestricted submission clearly included the constitutional question, and therefore unless the

⁴ Because of our conclusion concerning the scope of the submission, we agree with the defendant's contention that the trial court erred in reviewing the board's conclusion and agreeing that the defendant had indeed been discharged within the meaning of § 53-303e. This error, however, is harmless, since the court ultimately reached the correct conclusion, albeit by impermissibly granting the plaintiff a second determination of the underlying dispute on the merits.

board's construction of the scope of its authority is correct, the award must be vacated as not in conformity with the submission. The board expressly declined to make such a determination, concluding that its "quasi-judicial" power does not encompass a decision as to the constitutionality of § 53-303e. We agree.

The powers of government are divided into three distinct departments—legislative, executive and judicial, judicial power being vested in a Supreme Court, an Appellate Court, a Superior Court and such lower courts as the General Assembly establishes.⁶ "[T]he powers granted to the General Assembly are legislative only and those granted to the judiciary are judicial only."⁷ *Sarwak v. Wardes*, 167 Conn. 10, 31, 355 A.2d 49 (1974). "[T]he broad division between the power of the courts and the power of the legislature can be drawn as follows: 'It is the province of the legislative department to define rights and prescribe remedies; of the judicial to construe laws, determine the rights secured thereby, and apply the remedies prescribed.' *Ahmed v. Buckingham*, 78 Conn. 423, 428, 62 A. 616 (1906)."⁸ *State v. Clemente*, 166 Conn. 301, 309-10, 353 A.2d 723 (1974).

"No court can directly set aside an Act of the legislature; and the power to indirectly invalidate legislation is one which in the nature of things can exist in the judicial department only under a constitution in the American sense, and is limited by the authority from which it is derived; it is not a power of veto or revision, but purely the judicial power of interpretation."⁹

⁶ "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, i.e. wt., those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Conn. Const., art. III. "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. . . ." Conn. Const., amend. XX.

State v. Menillo, 171 Conn. 141, 147-48, 368 A.2d 136 (1976). Whether a statute is in conflict with the state constitution is the duty of the judiciary to determine. *Presseisen v. Derby & Anacoxia Developing Co.*, 112 Conn. 129, 145, 151 A. 518 (1920). Indeed, lower courts of limited jurisdiction have been advised to leave the question of constitutionality to a higher appellate court unless the statute is clearly unconstitutional or unless the rights of litigants make it imperative that the court pass upon the constitutional question. *State v. Muolo*, 119 Conn. 323, 326, 176 A.401 (1935); *Helm v. Welfare Commissioner*, 32 Conn. Sup. 585, 600, 348 A.2d 317 (1975).

In the present case the board, as an administrative agency, has not been granted the authority to consider constitutional issues. Furthermore, the constitutional challenge in the present case addresses the constitutionality of a statute, not with respect to its application but on its face. The legislature cannot confer upon an administrative agency the power to adjudicate facial unconstitutionality without doing violence to the separation of powers doctrine. *Zelvin v. Zoning Board of Appeals*, 30 Conn. Sup. 157, 163, 306 A.2d 151 (1973).

"A statute can overstep constitutional bounds if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts. . . ."¹⁰ *Erdman v. Parker*, 179 Conn. 582, 590, 427 A.2d 814 (1980). We will not ascribe to the General Assembly legislative encroachment upon territory reserved for the judiciary. Nor can the parties themselves, by agreement, confer such jurisdiction upon the board. See *In re Application of Smith*, 133 Conn. 6, 9, 47 A.2d 521 (1946). The board did not err in refusing to decide the constitutionality of § 53-303e.¹¹

⁷ Our conclusion that the board does not possess the authority to decide issues of facial unconstitutionality does not conflict with the established

The plaintiff's principal claim is that § 53-303e violates the establishment clause of the first amendment of the United States constitution. It is settled law that in order to pass muster under the establishment clause, the statute "in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive governmental entanglement with religion." (Citations omitted.) *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73, 93 S. Ct. 2956, 37 L. Ed. 2d 948 (1973). [See *Muller v. Allen*, U.S. (51 U.S.L.W. 5050, 5052 [June 28, 1983]).] If a legislative enactment fails any one part of the test, it must fall. *Stone v. Graham*, 449 U.S. 39,

principle that arbitrators act in a quasi-judicial capacity and are empowered to decide factual and legal questions unless the submission states otherwise. *Brown v. Department of Consumer Protection*, 190 Conn. 14, 18-19, 458 A.2d 485 (1983). "As it is used in the separation of powers provision of the constitution . . . the 'judicial power' cannot constitute an exclusive grant of every activity in which courts may engage." "The rule of separation of [governmental] powers cannot always be rigidly applied." [Citations omitted.] *Adams v. Baldwin*, 157 Conn. 156, 158, 251 A.2d 49 (1970). There are activities in which both the legislature and the judiciary may engage without violating the prohibitions of the constitution." *State v. Clemons*, 168 Conn. 591, 598, 323 A.2d 723 (1974); see *Brown v. Connecticut Law Court of Appeals & Friends*, 190 Conn. 518, 522, A.2d 676. Because of the public policy favoring expeditious dispute resolution in the informal context of arbitration rather than in the more formal, time-consuming and expensive context of ordinary litigation, we have always respected the autonomy of the arbitration process and the arbitrator's authority to decide questions of law and fact consistent with the submission. See *Witjard Employees Assn. v. Witjard*, 179 Conn. 678, 680-82, 427 A.2d 839 (1980); *Waterbury Teachers Assn. v. Waterbury*, 164 Conn. 635, 634, 324 A.2d 287 (1973). This autonomy does not, however, extend to determine issues of facial constitutionality. A statute which granted the board such power, which lies exclusively under the control of the courts, would be void as a violation of the separation of powers doctrine. See *State v. Clemons*, *supra*, 598-601. We reserve for another day the extent to which an arbitrator may have authority to determine constitutional questions, such as the due process implications of challenged procedures, which do not attack a statute as being unconstitutional on its face.

40-41, 101 S. Ct. 192, 66 L. Ed. 2d 199, reh. denied, 449 U.S. 1104, 101 S. Ct. 904, 66 L. Ed. 2d 832 (1980)." *Griswold Inn, Inc. v. State*, 183 Conn. 552, 559-60, 441 A.2d 16 (1981). Applying this three-part test, the trial court concluded that § 53-303e does not offend the strictures of the establishment clause. Although "[w]e approach the question with great caution . . . and sustain the act unless its invalidity is, in our judgment, beyond a reasonable doubt"; *Edwards v. Hartford*, 145 Conn. 141, 145, 139 A.2d 599 (1968), we are nevertheless unable to agree.⁷

Subsection (b) of § 53-303e, upon which the defendant relied in bringing his claim of wrongful discharge before the board and which represents the fulcrum of the plaintiff's establishment clause claim, states: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."

The defendant, relying on *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), urges that we construe subsection (b) as merely allowing employees to designate their individual "day of

⁷ Because of our conclusion concerning the established clause, we need not consider the plaintiff's claim that our decision holding the Sunday closing law unconstitutional, *O'dell's, Inc. v. Building Corp., Inc.*, 177 Conn. 304, 417 A.2d 147 (1979), renders § 53-303e invalid. Nor need we consider whether § 53-303e is void under article seventh of the Connecticut constitution, or whether, as the defendant avers, this issue is not properly before us.

We reject the defendant's contention that the trial court erred in considering the constitutionality of § 53-303e. The defendant makes this argument by invoking the general rule that "one cannot on appeal question the constitutionality of the statute under which he appeals." *Pertiles v. Water Resources Commission*, 146 Conn. 626, 632, 122 A.2d 822 (1962). The short answer to this claim is that the plaintiff did not "appeal" under § 53-303e, and it was the defendant, not the plaintiff, who appealed his claimed discharge to the board.

rest," and therefore the subsection reflects the clear secular purpose of protecting "'all persons from the physical and moral debasement which comes from uninterrupted labor.'" Id., 436. The defendant, underscoring the historical evolution of Sunday closing laws discussed in *McGowen*, would have this court construe the term "Sabbath" as utilized in subsection (b) as simply a "time of rest," without any religious overtones. We find this claim unpersuasive.

We note, first, that subsection (a) of § 53-303e, which prohibits employment for more than six days in any calendar week, adequately addresses the valid secular purpose, upheld in *McGowen*, of forbidding uninterrupted labor. "There is a presumption of purpose behind every sentence, clause or phrase in a legislative enactment so that in construing it no part is to be treated as insignificant and unnecessary." *Connecticut Light & Power Co. v. Castle*, 179 Conn. 415, 422, 426 A.2d 1324 (1980). Subsection (b), however, adds the additional criteria that an employee who designates any day as his observance of his "Sabbath" may not be compelled to work on that day.

We cannot construe the term "Sabbath," as utilized in § 53-303e (b), as synonymous solely with "day of rest" and therefore devoid of religious overtones. The commonly accepted meaning, General Statutes § 1-1, of the word is a time of rest and worship, especially where, as here, the term is capitalized.⁶ Moreover, to

⁶ "Sabbath . . . 1. A sabbath or day of rest. Specifically: The seventh day of the week in the Jewish calendar, corresponding to the period from Friday evening to Saturday evening, the observance of which as a day of rest and worship was enjoined in the Decalogue. It is kept by the Jews and some

the extent that "Sabbath" may be construed as a "day of rest," the "rest" is specifically mandated by the tenets of a particular religion.⁷ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 67, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977); *Redmond v. GAF Corporation*, 574 F.2d 897, 900 (7th Cir. 1978). "'Observe' means to refrain from unnecessary work on the Sabbath . . ."; *United States v. City of Albuquerque*, 545 F.2d 110, 112 (10th Cir. 1976); as that particular day is deemed holy under the beliefs of various religious sects. See *Chrysler Corporation v. Mays*, 561 F.2d 1282, 1283 (8th Cir. 1977). Thus, "[t]he Sabbath is a day of rest and worship, generally recognized as such." *State v. Duncan*, 118 La. 702, 706, 43 So. 283 (1907). The day that is allotted pursuant to § 53-303e (b) comes with religious strings attached.

Christians. In the Eastern Churches Saturday is a half holiday on which the Liturgy is celebrated and no fasting is allowed (except on Holy Saturday). Manual work, however, is permitted. b. The first day of the week, Sunday, observed by Christians as a day of rest and worship. . . . b. [not rep.] A time of rest or repose; intermission of pain, effort, sorrow, or the like." Webster, New International Dictionary (3d Ed.).

"SABBATH, the weekly day of rest and religious observance. The term is derived from its use as the Hebrew Sabbath, denoting the seventh day of the week, or Saturday. Most Christians observe the Sabbath on Sunday, although some sects such as the Seventh Day Adventists keep it on Saturday. The Muslim Sabbath is Friday." 24 Encyclopedia Americana 69 (International Ed., 1980).

⁷ "The reason given for resting on the Sabbath is twofold. First, the day has to be kept holy because God made heaven and earth in six days, and rested on the seventh day, wherefore the Lord blessed the Sabbath day and hallowed it" (Exodus 20:11). Second, the day serves as a reminder that "they were a servant in the land of Egypt, and the Lord thy God brought them out thence" (Deuteronomy 5:15). As strictly interpreted, the penalty for desecrating the Sabbath was death "whosoever doth any work in the Sabbath day, he shall surely be put to death" (Exodus 31:15)." 24 Encyclopedia Americana 69 (International Ed., 1980).

Although the McGowen court upheld the "Sabbath Breaking" statute at issue in that case because of the valid secular purpose of providing a common day of rest for both religious and nonreligious citizens; *McGowen v. Maryland*, *supra*, 450-52, § 53-303e (b) takes this rationale one step further, a step which, in our view, invalidates the subsection under the establishment clause. Subsection (b) authorizes each employee to designate his or her own observance of Sabbath. The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53-303e (b) does not pass the "clear secular purpose" test of establishment clause scrutiny.¹²

With respect to the second tier of establishment clause analysis, which prohibits the primary effect of an enactment to advance or inhibit religion, it is clear that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Committee for Public Education v. Nyquist*, *supra*, 771. Although a law which places an "imprimatur of State approval on religious sects or practices"; *Widmar v. Vincent*, 454 U.S. 263, 274, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981); is strong evidence that the enactment impermissibly advances religion, it is equally well settled that "a law may be one 'respecting an establishment of religion' even though its consequence is not

¹² By our decision we do not imply that the state may not legislate in so as to allow individual employees to designate their desired day off. Even assuming, however, that this was one purpose intended by the legislature in enacting § 53-303e (b), the state may not employ religious means to achieve secular ends. "The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests." *Acosta & v. Free*, 603 F.2d 807, 807 (5th Cir., 1980); *aff'd*, 446 U.S. 813, 102 S. C., 1297, 71 L. Ed. 2d 450 (1983); see *Abington School District v. Schempp*, 374 U.S. 203, 224, 40 S. Ct. 164, 16 L. Ed. 2d 888 (1969).

to promote a 'state religion' . . . and even though it does not aid one religion more than another but merely benefits all religions alike." (Citation omitted.) *Committee for Public Education v. Nyquist*, *supra*. Moreover, the scope of the benefit conferred by the enactment to both religious and nonreligious segments of society is an important indicator of primary effect. "The provision of benefits to so broad a spectrum of [religious and nonreligious] groups is an important index of secular effect. If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar v. Vincent*, *supra*, 274-75.

While § 53-303e (b) does not favor one religion over another, and does not provide direct aid to religious institutions in the form of money or property, it confers its "benefit" on an explicitly religious basis. Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing. Workers who do not "observe a Sabbath" may not avail themselves of the benefit provided by the subsection, and are not entitled to take a specific day off with impunity. The inescapable conclusion is that § 53-303e (b) possesses the primary effect of advancing religion.

It is the third prong of establishment clause analysis, which forbids excessive governmental entanglements with religion, which is most troublesome when considering § 53-303e (b). Subsection (c) of § 53-303e empowers the state board of mediation and arbitration to resolve disputes arising under subsection (b). Inevitably, as employers challenge the sincerity of employees' Sabbath observance, the board's inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious

activities which may fairly be labelled "observance of Sabbath." Especially in an age of unparalleled religious freedom and diversity, "[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. 602, 626, 92 S. Ct. 2166, 29 L. Ed. 2d 745, reh. denied, 404 U.S. 876, 92 S. Ct. 24, 30 L. Ed. 2d 123 (1971); see *Grievold Inn, Inc. v. State*, *supra*, 564. The enforcement mechanism of subsection (a), therefore, is exactly the type of "comprehensive, discriminating and continuing state surveillance"; *Lemon v. Kurtzman*, *supra*, 619; which creates excessive governmental entanglements between church and state.

We conclude that General Statutes § 53-300e (a) is clearly violative of the establishment clause, and the trial court therefore erred when it confirmed the arbitration award based on the statute and when it denied the motion to vacate that award.¹¹

There is error, the judgment is set aside and the case is remanded with direction to render judgment granting the plaintiff's application to vacate.

In this opinion, BRETHOUR, C. J., PETTUS and HEALEY, Jr., concurred.

SULLIVAN, J. (dissenting in part). I have no disagreement with the conclusion reached by the majority that General Statutes § 53-300e violates the establishment clause but I would not have reached that issue in the procedural posture in which it is presented by this case. I would find error in the refusal of the board of mediation and arbitration to decide this constitutional issue. I would find that the board of mediation and arbitra-

¹¹ We note that our decision extends only to subsection (a) of General Statutes § 53-300e. General Statutes § 1-8, see *Berry v. Board*, 171 Conn. 491, 495, 386 A.2d 106 (1978).

tion has "imperfectly executed" its powers by refusing to decide this constitutional issue, which is critical to a proper determination of the lawfulness of the plaintiff's discharge. See General Statutes § 52-418 (a) (4). For this reason I agree with the majority that the trial court erred in failing to grant the defendant's application to vacate the award, but I would also direct a rehearing in accordance with General Statutes § 52-418.

I disagree with the majority that the "quasi-judicial" power of the board "does not encompass a decision as to the constitutionality of § 53-300e." I am not aware of any decisions by the higher courts¹² of this country which support a distinction between constitutional issues and other questions of law with respect to the competency of arbitrators or administrative agencies to decide them. The majority appears to rely upon the separation of powers doctrine as precluding the delegation of "judicial power" outside the court system. A decision by a nonjudicial authority upon other legal questions, the propriety of which the majority opinion does not challenge, is an exercise of judicial power of the same kind as that involved in resolving a constitu-

¹² The only authority cited in the majority opinion which even considers the competency of a nonjudicial agency to decide a law unconstitutional is *Zelvin v. Zoning Board of Appeals*, 30 Conn. Sup. 157, 163, 306 A.2d 151 (1973), which contains the following: "Jurisdiction over such issues rests solely with the judiciary. *Riley v. Liquor Control Commission*, 153 Conn. 242, 250 [218 A.2d 402 (1966)]; *Preveila v. Derby & Anwiss Developing Co.*, 112 Conn. 129, 145 [151 A.518 (1930)]." The citation of *Riley* refers to a dictum that "we prefer, if possible, to decide" constitutional issues, but this court, nevertheless, refused to decide the constitutional issue raised because the requirements for a declaratory judgment had not been met. In *Preveila* this court found an attempt by the legislature to overturn the effect of a prior decision of the court to constitute an unconstitutional encroachment upon the judicial authority. Neither case dealt with the power of an administrative agency or arbitrators to decide a constitutional issue which arises in the course of an adjudication within the scope of its delegated authority.

tional question. Not only is the distinction made by the majority wholly unprecedented, but it is also thoroughly impractical in the adjudication processes of arbitrators and public agencies where constitutional issues frequently arise. Will it be necessary hereafter to adjourn such proceedings until a judicial determination of the constitutional issue can be obtained as a kind of advisory opinion? To impose such a burden upon dispute resolution procedures, judicial or nonjudicial, is a wholly unwarranted extension of the separation of powers principle.

Accordingly, I dissent.

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APPENDIX B
DECISION OF SUPERIOR COURT

<p>NO. 252823 CALDOR, INC. VS. DONALD E. THORNTON</p>	<p>SUPERIOR COURT JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD AUGUST 26, 1981</p>
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MEMORANDUM OF DECISION

The petitioner in this action seeks an order vacating an arbitration award. The respondent has filed a cross-application to confirm the arbitration award.

The award in question was made by the State Board of Mediation and Arbitration and was based upon a finding that Caldor, Inc., the petitioner in this case, violated § 53-303e of the Connecticut General Statutes, which states:

(a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.

(b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of

mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

(e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

Conn. Gen. Stat. Rev. § 53-303e

The petitioner claims that § 53-303e violates the Establishment Clause of the first amendment of the United States Constitution,¹ and argues that the arbitration award must, therefore, be vacated.

The United States Supreme Court sets forth a three-part test to determine whether a law violates the Establishment Clause. "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive governmental entanglement with religion." (citations omitted). *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973). If a legislative enactment fails any one part of the test, it must fall. *Stone v. Graham*, ____ U.S.____, 49 U.S.L.W. 3369 (Nov. 18, 1980).

Upon its face, the statute reflects a clearly secular legislative purpose. It is beyond question that a state,

¹ "U.S. Constitution amend. I] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

in the exercise of its police powers, may regulate the working conditions of its citizens. The United States Supreme Court has ruled that states may set aside Sunday as a day of rest. *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.

Id., 366 U.S. 420, at 436; *Soon Hing v. Crowley*, 113 U.S. 703, 710.

The primary effect of Connecticut General Statutes § 53-303e is to limit the number of days which an employee may be compelled to work to six per week. After stating in section (a) that no employee may be compelled to work more than six days a week, the statute provides in section (b) that an employee may not be required to work on his Sabbath. The inclusion of section (b) in the statute does not violate the Establishment Clause. "[T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide with the tenets of some or all religions." *McGowan v. Maryland*, *supra*, 366 U.S. 420, at 442. In *McGowan v. Maryland*, the Supreme Court upheld a Sunday closing law, stating that the purpose and effect of the statute was not to aid religion, but to set aside a day of rest and recreation.

While that decision discusses the desirability of a common day of rest, the Connecticut scheme of prohibiting an employee from being required to work seven days a week and allowing the employee to designate his Sabbath as his day of rest cannot be termed "excessive entanglement with religion." The statute avoids forcing all employees to conform to Sunday as a day of rest when their own religion may observe a different day as Sabbath. Thus, the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice.

The petitioner also argues that § 53-303a is invalid because another provision (§ 53-302a) of the same act has been held unconstitutional. *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979). Section 1-3 of the Connecticut General Statutes states that "[i]f any provision of any act passed by the general assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act." Conn. Gen. Stat. Rev. § 1-3

By General Statutes § 1-3 the legislature has shown its intention that there is to be a presumption of separability of the provisions and of the applications of statutes. See *Burton v. Hartford*, 144 Conn. 80, 69-90, 127 A.2d 251. With regard to the separability of provisions, to overcome the presumption it must be shown that the portion declared invalid is so mutually connected and dependent on the remainder of the statute as to indicate an intent that they should stand or fall together; *Ames v. Brooks*, 141 Conn. 298, 300, 106 A.2d 152, appeal dismissed, 348 U.S. 880, 75 S. Ct. 125, 99 L. Ed. 693; and this interdependence would

warrant a belief that the legislature would not have adopted the remainder of the statute independently of the invalid portion. *Burton v. Hartford*, *supra*, 90.

State v. Menillo, 171 Conn. 141 (1976)

The petitioner has not made such a showing in regard to Connecticut General Statutes § 53-303a.

Accordingly, the application for an order vacating the arbitration award is denied; the cross-application for an order confirming the award is granted.

aBrennan, J.
BRENNAN, J.

APPENDIX C

**ORDER OF JUSTICE MARSHALL
DATED NOVEMBER 22, 1983**

SUPREME COURT OF THE UNITED STATES

No. A-383

DONALD E. THORTON,

Petitioner,

v.

CALDOR, INC.

**ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI**

Upon Consideration of the application of counsel
for petitioner,

It Is Ordered that the time for filing a petition for
writ of certiorari in the above-entitled cause be, and
the same is hereby, extended to and including
January 4, 1984.

s/Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of November, 1983

APPENDIX D

**ORDER OF JUSTICE MARSHALL
DATED JANUARY 4th, 1984**

SUPREME COURT OF THE UNITED STATES

No. A-383

DONALD E. THORNTON,

Petitioner,

v.

CALDOR, INC.

**ORDER FURTHER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

Upon Consideration of the application of counsel
for petitioner,

It Is Ordered that the time for filing a petition for
writ of certiorari in the above-entitled cause be, and
the same is hereby, extended further to and including
January 11, 1984.

s/Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of January, 1984

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 10 1984

No. 85-1108

In the Supreme Court of the United States

October Term, 1985

ESTATE OF DONALD E. THORNTON, Petitioner

v.

CALICO, Inc., Respondent

MOTION OF THE STATE OF CONNECTICUT TO
INTERVENE
AND
BRIEF IN SUPPORT OF THE PETITION FOR
CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 69-1158

BESTATE OF DONALD E. THOMAS, Petitioner

v.

CALOON, INC., Respondent

**MOTION OF THE STATE OF CONNECTICUT TO
INTERVENE**

**MOTION OF THE STATE OF CONNECTICUT TO
INTERVENE AS OF RIGHT**

Pursuant to 28 U.S.C. §2403(b), the State of Connecticut moves this Court for permission to intervene in support of the petition for certiorari and in favor of reversing the decision below—a decision of the Connecticut Supreme Court invalidating an important Connecticut statute as violative of the United States Constitution.

28 U.S.C. §2403(b) provides that, as a matter of right, a state may intervene in any court of the United States—including this Court—where the constitutionality of a state statute affecting the public interest is drawn into question. Rule 28.4(c) of this Court's Rules implements that right. Section 2403(b), which treats the right of states to intervene, was passed in 1970 to complement §2403(a), which treats the

right of the United States to intervene. Section 2403(a) gives the United States the right to intervene in any federal proceeding in which a federal statute is challenged on constitutional grounds, and, pursuant to that statute, the United States has intervened in this Court when a constitutional challenge to a federal statute appeared in a petition for certiorari to a state court. *Clinton Co. v. Edmond*, 399 U.S. 614, 620 (1967). Section 2403(b) creates for states a similar right to intervene in this Court when this Court is, as it is in the instant case, the first federal court in which the state statute is challenged on constitutional grounds. R. Stern & E. Grossman, Supreme Court Practice §27.28 (5th ed. 1979) ("As applied to Supreme Court proceedings, [2403(b)] means that the state is no longer relegated to the position of an 'owner' if the constitutionality of a state statute is drawn in question in a proceeding in which neither the state nor an agency thereof is a party"); *id.* at 627 n.43 ("Now, of course, a state attorney general can intervene as of right under [2403(b)]" when the constitutionality of a state statute is drawn into question in a Supreme Court proceeding in which the state is not a party); J. Moore, Federal Practice (Supreme Court Volume) ¶26.08 (1987) (discussing both Rule 24.4(c) and 2403(b)) ("[2403(b)] applies only to cases in courts of the United States, [in a case coming from the state courts] the first opportunity the state attorney general has to intervene pursuant to [2403(b)] is in the Supreme Court."); *See also* 1978 U.S. Code Cong. & Ad. News 2300, 2307 (legislative history); *Vietnam Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 640 F. Supp. 228, 233 n.27 (S.D. Tex. 1986) (section 2403(b) applies "whenever the constitutionality of a state statute affecting the public interest is drawn into question").

In the instant case, the State of Connecticut did not appear below; the litigation was between private parties. In Con-

nnecticut, no statute or court rule requires private litigants to notify the State or the Attorney General that a statute of the State is being challenged. Thus, the Attorney General was not on notice that §53-303e was under attack until the Connecticut Supreme Court rendered its decision in September of that year. Upon reviewing that decision, the Attorney General has decided to seek intervention in this Court. Section 53-303e is a statute of substantial importance to the citizens of Connecticut, and written and oral arguments on its behalf should be made by the State itself.

v

QUESTIONS PRESENTED

Does the Establishment Clause of the First Amendment
Proscribe State Statutes Designed to Prevent Religious Dis-
crimination by Private Employers?

Does the Establishment Clause of the First Amendment
Proscribe State Statutes That Do Nothing More Than
Impose upon Private Employers the Same Obligation of
Non-Discrimination Imposed upon the State by this Court
in Sherbert v. Verner, 374 U.S. 398 (1963), and Its Progeny?

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In the Supreme Court of the United States

October Term, 1980

No. 80-1159

Estate of Donald E. Thornton, Petitioner

v.

Cabot, Inc., Respondent

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

II.

JURISDICTION

The Petitioner, the Estate of Donald E. Thornton, has stated the grounds for jurisdiction in this case.

III.

STATEMENT OF THE CASE

In 1973, the Petitioner, Donald E. Thornton ("Thornton"), began working as a department manager for the Respondent, Cabot, Inc. ("Cabot"). At that time, Connecticut's Sunday closing law was in effect, and, in compliance with that law, Cabot closed its doors on Sundays and did not require its employees to work on that day. In 1977, however, following the invalidation of the closing law by the Connecticut courts,¹

¹ *Cabot Inc. v. Bedding Barn, Inc.*, 177 Conn. 204, 417 A.2d 545 (1979); *State v. Anonymous*, 83 Conn. Supp. 141, 386 A.2d 520 (C.P. 1979); *State v. Anonymous*, 83 Conn. Supp. 55, 384 A.2d 564 (C.P. 1979).

8

Cobbe began to open its stores for business on Sundays. As part of this new policy, Cobbe began to require department managers, including Thornton, to work one out of every four Sundays.

Thornton, a devout Presbyterian, sincerely believed that his religion obliged him to observe a Sunday Sabbath and forbade him to work on that day. Nonetheless, he complied with Cobbe's new work policy because he feared for his job, because he needed the income to support his family, and because he was unaware of the possibility that state law protected his right to refuse to work on his Sabbath. Between 1977 and 1979, therefore, Thornton worked a total of thirty-one (31) Sundays.

In late 1979, after obtaining legal advice, Thornton informed Cobbe that he would no longer work on Sundays because that day was his Sabbath. He also informed the store that he had been advised that his right to refuse to work on his Sabbath was protected by Connecticut General Statute, § 51-30(a), which reads in pertinent part:

(b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his discharge.¹

Thornton subsequently met several times with executives of Cobbe in an attempt to negotiate an arrangement acceptable to both sides. Cobbe finally refused to allow Thornton to remain in the position of department manager in its Tir-

¹Conn. Gen. Stat. § 51-30(a) (1979). Section 51-30(a) is set out in its entirety in Appendix A of this Brief at 1a.

ington, Connecticut store unless he agreed to work on Sundays. Instead, it offered him two alternatives: he could continue as a department manager in one of its Massachusetts stores (the Massachusetts stores did not require Sunday work); or he could work in the Tiverton store in a non-managed capacity (under the union contract, non-managed employees were not required to work on Sundays). Thornton declined the first alternative because transfer out of state would have substantially increased his commuting time; he declined the second because promotion to a non-managed position would have meant a reduction in salary from \$1.40 per hour to \$1.20 per hour.

When Cobbe insisted on discharging him, Thornton refused to report to work; instead, he filed a grievance with the State Board of Mediation and Arbitration pursuant to § 51-30(a). Cobbe defended by asserting that Thornton had not been "discharged" within the meaning of the statute and by attacking the statute as an establishment of religion in violation of the First Amendment to the United States Constitution. The Board determined that Thornton had been improperly "discharged" in violation of § 51-30(a). The Board concluded that it did not have authority to entertain Cobbe's constitutional challenge, and it ordered Cobbe to reinstate Thornton and reinstate him for lost pay and fringe benefits that he would have received had he not been discharged.²

Cobbe appealed to the Hartford, New Britain Superior Court to reverse the Board's ruling, and Thornton cross-appealed to confirm the award. The court granted Thornton's cross-appeal and affirmed the Board's decision. It addressed Cobbe's

²Thornton died on February 4, 1980. Since that time this action has been maintained by his Estate, which would receive the damages for lost pay and fringe benefits owed to Thornton by Cobbe under the order of the Board of Mediation.

Pet's constitutional argument and ruled that the statute, on its face and as applied in this case, did not violate the Establishment Clause (Pet. App. at 12c-13a).

On appeal, the Connecticut Supreme Court agreed, saying:

Although we do not agree that the Board exceeded its power in determining that Caliber violated the provisions of §10-200a, we agree with Caliber's contention that the statute does not pass constitutional muster under the criteria of the establishment clause.

(Pet. App. at 8a). The Connecticut Supreme Court based its decision solely on the Establishment Clause of the First Amendment to the United States Constitution. (Pet. App. at 8a). It expressly refused to consider the validity of §10-200a under the Connecticut Constitution. (Pet. App. at 11a n.7).

III.

STATEMENT OF ARGUMENT

The decision of the Connecticut Supreme Court is in direct conflict with the decisions of numerous state and federal courts on the identical issue. Numerous state and federal courts have upheld against Establishment Clause attack statutes imposing on employers a duty to accommodate the religious beliefs of employees—including the religious beliefs of employees who, like the Petitioners, are sabbath observers. The Connecticut Supreme Court failed to mention, let alone to address, the contrary holdings of these other courts. The intervention of this Court is required to resolve the conflict.

The decision of the Connecticut Supreme Court misapplies the applicable decisions of this Court on the meaning of the Establishment Clause of the First Amendment. Section 53-300e has a clearly secular purpose and effect—the equalization of employment opportunities by minimizing the discriminatory impact of employment practices upon religious individuals. Neither religious activities nor religious institutions are directly sponsored or subsidized by the statute; a sabbath observer freed from work on his or her sabbath because of the statute may go to a religious service or not. Finally, the statute does not impermissibly entangle the government and religion, because it requires no more government involvement in religion than the concededly nonexclusive entanglement that occurs when the state must determine whether a purported church qualifies for a property tax exemption.

The decision of the Connecticut Supreme Court flatly contradicts the holding of this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). The Connecticut legislature merely has forbidden the type of discrimination highlighted by the *Sherbert* Court. If an employer discharges an employee for refusing to work on his or her sabbath, the employer has, in fact, discharged the employee because he or she is a sabbath observer. If it is not an "establishment of religion" for the State of Connecticut *itself* to accommodate sabbath observers as part of its unemployment compensation scheme (it is required to do this by *Sherbert*), then it cannot be an "establishment of religion" for the State to require private employers to provide the same accommodation.

Finally, this case provides an opportunity for this Court to consider an issue of vital national importance—the legitimacy of federal and state efforts to accommodate religious interests of employees in the workplace.

IV.

ARGUMENT

A.

THE DECISION OF THE CONNECTICUT SUPREME COURT IS IN DIRECT CONFLICT WITH THE DECISIONS OF NUMEROUS STATE AND FEDERAL COURTS ON THE IDENTICAL ISSUE.

In striking down §53-30a, the Connecticut Supreme Court offered a rigid and unqualified interpretation of the Establishment Clause of the First Amendment of the United States Constitution. In so doing, it not only invalidated an important act of the Connecticut General Assembly; it placed itself in direct conflict with decisions upholding against Establishment Clause attack the constitutionality of measures imposing on employers a duty to accommodate the religious beliefs of employees who, like the Petitioner, are sabbath observers. *Rankine v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 892, 154 Cal. Rptr. 907 (1979), appeal dismissed, 444 U.S. 993 (1980); *Hardison v. Trans World Airlines*, 827 F.2d 33 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (8th Cir. 1975), *aff'd mem.* by equally divided court, 439 U.S. 65 (1976), *vacated and remanded*, 439 U.S. 903 (1977); *Kentucky Commission on Human Rights v. Kerna Bakery, Inc.*, 644 S.W.2d 390 (Ky.Ct.App. 1982), *cert. denied*, _____ U.S. _____, 103 S.Ct. 3115 (1983); *State Division of Human Rights ex rel. Clarke v. Carnation Co.*, 86 A.D.2d 977, 445 N.Y.S.2d 330 (4th Dep't 1982), *cert. denied*, _____ U.S. _____, 103 S.Ct. 1194 (1983); *North Shore University Hospital v. State Human Rights Appeal Board*, 82 A.D.2d 799, 439 N.Y.S.2d 409 (2d Dep't 1981), *appeal dismissed*, _____

U.S. _____, 103 S.Ct. 235 (1983).⁶ The decision below also conflicts with decisions upholding against Establishment Clause attack the constitutionality of measures requiring employers and unions to accommodate in the workplace religious beliefs other than sabbath observance. *McDaniel v. Eason International, Inc.*, 696 F.2d 34 (8th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Division*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145

⁶In each of the cases cited in text, the respective court upheld against Establishment Clause attack a measure requiring an employer to accommodate a sabbath observer's request not to work on his or her sabbath or other religious holiday. See also *Brown v. General Motors Corp.*, 691 F.2d 696 (8th Cir. 1979) (holding, without explicitly reaching the constitutional issue, that the religious accommodation provisions of Title VII require an employer to permit an employee time off without pay to observe his sabbath).

The term "sabbath observer" designates one who sets apart one day during the week as a holy day, different from other days, and who believes that it is inappropriate to work on that day. For example, most Christians consider Sunday, most Jews consider Saturday, and most Muslims consider Friday as their sabbath.

The term "Sabbatarian" designates a sabbath observer who observes Saturday as his or her sabbath. Numerous state statutes expressly exempt Sabbatharians from Sunday closing laws. See, e.g., W.Va. Code §61-10-27. The decision of the Connecticut Supreme Court not only conflicts with decisions, such as those cited in text, which validate measures requiring employers to accommodate a sabbath observer's request not to work on his or her sabbath, but also conflicts with decisions upholding or even mandating exemptions for Sabbatharians from Sunday closing laws. In *Brownfield v. Brown*, 396 U.S. 699, 628 (1951), this Court indicated that, where a state chooses to enact a Sunday closing law, it "may well be the wise solution" to permit Sabbatharian merchants to open for business on Sunday in contravention of the general requirement that businesses remain closed on that day.

(1982); *Tosley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1090 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Jordan v. North Carolina Nat'l Bank*, 299 F. Supp. 172 (W.D.N.C. 1975), *revid on other grounds*, 565 F.2d 72 (4th Cir. 1977).⁵ The interpretation of the Establishment Clause propounded by the Connecticut Supreme Court cannot co-exist with the interpretation of that Clause embodied in the decisions of those other courts—all of which went unanswered by the court below. The intervention of this Court is required to resolve the conflict.

The conflict between the decision below and the decisions of courts outside Connecticut is most visible in cases involving factual situations almost identical to that presented in this case. For example, in *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 602, 134 Cal. Rptr. 907 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 988 (1980), a Presbyterian was discharged for refusing to work on Saturdays and religious holidays. The California Supreme Court, relying on a state provision forbidding religious discrimination in employment, held that the employer was required to provide unpaid leave for religious holidays if it could do so without

⁵While McDonald, Andrews, Tosley, and Nottelson do not involve a sabbath observer's request not to work on his or her sabbath or other religious holiday, in each of them, the court upheld against an Establishment Clause challenge the right of the government to require employees and unions to accommodate the religious beliefs of employees. While not factually identical to the instant case, these cases would seem to be conceptually indistinguishable. Indeed, the Nottelson court held that it was bound by this Court's summary dismissal of the appeal in Rankins (a case upholding a cause identical to that struck down by the decision below) and rejected the union's attempt to distinguish the case. 643 F.2d at 452.

undue cost. The court rejected the argument that this accommodation contravened the Establishment Clause. Applying the same three-part test used by the Connecticut Supreme Court in the case before, the California court found it "clear" that the purpose and primary effect of imposing a duty of accommodation "are not to favor any religion but [are] to promote equal employment opportunities for members of all religious faiths." 24 Cal. 3d at 178, 593 P.2d at 606-07, 134 Cal. Rptr. at 914. The court saw no entanglement problem. *Id.*, 593 P.2d at 606, 134 Cal. Rptr. at 914. It concluded:

[T]he reasonable accommodation [of the employer's] religious observances required by [California] does not constitute expenditure of money or preference of one religion over another. On the contrary, the effect of the accommodation is simply to lessen the discrepancy between the condition imposed on [the employer's] religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations or regular school calendar.

Id., 593 P.2d at 606, 134 Cal. Rptr. at 914.

In *Kentucky Commission on Human Rights v. Krome Bakery, Inc.*, 644 S.W.2d 390 (Ky.Ct.App. 1982), cert. denied, _____ U.S. _____, 103 S.Ct. 2115 (1983), a sabbath observer refused to work on Sundays, notwithstanding his employer's practice (common in the industry) of giving only Tuesdays and Saturdays off. When he was discharged, he brought suit under Kentucky's religious accommodation provisions, Ky. Rev. Stat. §§344.030(3), 244.040(1). The Kentucky Court of Appeals held that the statute required the company to accommodate the religious beliefs of the em-

ployee. Applying the same three-part test used by the Connecticut court in the case below, it expressly rejected the employer's claim that the statute violated the Establishment Clause. In the Kentucky court's view, the secular purpose of the accommodation provision was "to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon one of the precepts of his religion in order to accept work." By adopting it, "the Legislature merely provided equal employment opportunity for members of all religious faiths." See S.W.2d at 253. The primary effect of the provisions was not to advance religion because it "in no way offered exemption, financial support, or active involvement to any religious activity" and "applied to individuals and not to any religious organization." Id. Finally, the provisions did not involve an excessive entanglement of government in religion because "the Legislature's interest here in religion is only for the purpose of curbing religious discrimination in employment" and that "certainly cannot be interpreted as 'excessive entanglement' in any sense of the words." Id.

The states have not been alone in acting to promote accommodation of religion in the workplace. In 1972, Con-

necticut state law passed provisions that impose upon employers a duty to accommodate the religious beliefs of employees. N.Y. Exec. Law § 296(1)(b) (Comd. 1982) (explicitly accommodating Sabbath observance); Va. Code 10.1-50.2 (completely accommodating Sabbath observance); Pa. Stat. Ann. Tit. 43, 9000.1 (completely accommodating Sabbath observance who are public employees). See also Alaska Stat. § 14.40.200; Ariz. Rev. Stat. Ann. §§ 41-4411(A), 41-4405(B)(1); Ky. Rev. Stat. §§ 64.020, 64.040(1); Mass. Gen. Laws Ann. ch. 131B, § 4(1A); N.H. Rev. Stat. Ann. §§ 304-A:3(4), 304-A:9(1); S.C. Code Ann. § 1-13-30 (4); Texas Commission on Human Rights Act (1983), § 1.B. 14, § 11.01(3), § 11.01(3); Wis. Stat. Ann. § 111.307. These laws impose either by explicit language and others by judicial interpretation a duty to accommodate the religious beliefs of an employee,

thus amended Title VII of the Civil Rights Act to place an affirmative obligation upon an employer to accommodate an employee's religious practice.⁷ This Court considered the provision in *Twaig World Airlines, Inc. v. Hardison*, 437 U.S. 62 (1977), wherein a Presbyterian sought a ruling that he was entitled under the statute to be excused from working on his sabbath. While the Hardison Court chose not to determine the constitutionality of Title VII's accommodation mandate, the dissent noted that:

the constitutionality of the statute is not placed in serious doubt simply because it contains an exemption or exception from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problem in exempting religious observers from state-imposed duties, even when

such as Thorium, whose religion forbids him or her to work on a certain day.

The states have survived challenges based on the Establishment Clause. For example, in the past two years, New York's religious accommodation provision (which is nearly identical in scope to Connecticut's 1982 rule and which is set out fully in Appendix B at 1(a)) has been challenged twice on Establishment Clause grounds; although the Establishment Clause argument was not expressly addressed in the opinion of the New York courts, those courts twice have upheld the statute and this Court has twice refused to disturb those judgments. State Division of Human Rights ex rel. Clarke v. Connecticut Commerce, 80 A.D.2d 877, 443 N.Y.S.2d 550 (1st Dep't 1980), cert. denied, U.S. ___, 100 S.Ct. 1194 (1980); North Shore University Hospital v. State Human Rights Appeal Board, 82 A.D.2d 706, 439 N.Y.S.2d 419 (2d Dep't 1981), appeal dismissed for want of jurisdiction, U.S. ___, 100 S.Ct. 225 (1982).

⁷Civil Rights Act of 1964, Pub. L. No. 88-352, 70 Stat. 243, 253-46 (1964) (amended to extend to 42 U.S.C. § 2000e-17 (1982)). See also Equal Employment Opportunity Act of 1972, Pub. L. No. 90-285, 82, 84 Stat. 319 (1972) (amended at 42 U.S.C. § 2000e(j) (1982)).

the exemption was in no way compelled by the Free Exercising Clause.

432 U.S. at 90 (Marshall, J., dissenting) (citations omitted). In the years since *Hardison* several courts have held that Title VII requires employers to permit employees time off to observe religious holidays (absent special circumstances), but none of those courts has addressed expressly the constitutional issue.⁸ Several courts have applied Title VII to require accommodation of religious beliefs other than a belief in the sabbath, however, and some of those courts have addressed challenges to Title VII based upon the Establishment Clause. Most of the courts that have reached the issue have found the accommodation provision of Title VII constitutionally acceptable.⁹ These opinions, though drawn from fact situations not identical to that in the case below, directly conflict with the Connecticut Supreme Court's decision.

We commend to the Court's attention just one of many examples. In *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.) cert. denied, 454 U.S. 1046 (1981), a Seventh-Day Adventist became convinced that his religion forbade

⁸See, e.g., *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); *Padon v. White*, 465 F. Supp. 602 (S.D. Tex. 1979).

⁹*McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), aff'd mem. by equally divided court, 429 U.S. 65 (1976), vacated and remanded, 433 U.S. 903 (1977); *Jordan v. North Carolina Nat'l Bank*, 399 F. Supp. 172 (W.D.N.C. 1975), rev'd on other grounds, 565 F.2d 72 (4th Cir. 1977).

him to pay dues to a labor organization. Therefore, after seventeen years as a dues-paying union member, he informed the union that he would no longer pay his dues to them—but instead would pay an equivalent sum of money to the American Cancer Society. The union refused the requested accommodation and notified Nottelson that, if he did not pay his dues to the union, he would be discharged under the union security clause in the union's contract. Eventually, Nottelson was fired and, invoking the religious accommodation provisions of Title VII, brought suit against his employer and the union.

Both the district court and the court of appeals found for Nottelson, rejecting the defendants' claim that the religious accommodation provision violated the Establishment Clause. The Seventh Circuit relied in part on this Court's summary affirmation of *Rankins v. Commission on Professional Competence*, *supra*. It acknowledged that *Rankins* (which, like the instant case, dealt with a sabbath observer's request not to work on his sabbath) was not factually identical to the case before it, but found that factual difference "a distinction without substance." 643 F.2d at 453.

Then, assuming *arguendo* that *Rankins* did not control the case before it, the Nottelson court went on to apply the same three-part Nyquist test used by the Connecticut Supreme Court in the instant case and found Title VII's accommodation provision constitutionally acceptable. In the court's view, the purpose of the accommodation provision was clearly secular—"to protect the employment opportunities not only of the victims of overt discrimination but also of individuals who are unintentionally discriminated against because their religious convictions are not reflected in facially neutral majoritarian rules." 643 F.2d at 454. The Seventh Circuit also concluded that the accommodation provision

did not "have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another." *Id.* In the court's view, the provision did "not confer a benefit on those accommodated, but rather relieve[d] those individuals of a special burden that others [did] not suffer. . ." *Id.* Finally, the *Nottelson* court concluded that the accommodation provision of Title VII did not foster an excessive government entanglement with religion, since the statute required the government

only to determine whether a belief is "religious" within the meaning of the statute . . . and whether it is sincerely held, a question of credibility. This is essentially the same determination required in implementing the conscientious objector exemption under the selective service statutes. . . .

Id. at 455.

Based upon what amounts to a point by point refutation of the reasoning in the Connecticut Supreme Court's decision in the instant case, the *Nottelson* court held that the accommodation provisions of Title VII—which it found identical to provisions mandating accommodation of a sabbath observer's request not to work on his or her sabbath—did *not* violate the Establishment Clause of the First Amendment.

B.

THE DECISION OF THE CONNECTICUT SUPREME COURT MISAPPLIES THE APPLICABLE DECISIONS OF THIS COURT ON THE MEANING OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973), this Court set forth the standard for

determining whether a state statute violates the Establishment Clause of the First Amendment. To pass constitutional muster, first, the statute must serve a clearly secular legislative purpose; second, its primary effect must be neither to advance nor inhibit religion; and, third, it must avoid excessive government entanglement with religion. In the decision below, the Connecticut Supreme Court purported to apply—but in fact misapplied—this standard.

(1) *Purpose.* Section 53-303e was designed for a clearly secular purpose—to achieve equality of employment opportunities and to eliminate discriminatory employment practices. It is intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, thereby protecting the employment opportunities of those who are (intentionally or unintentionally) disadvantaged because their religious convictions are not reflected in facially neutral majoritarian rules. This is a secular purpose, part of "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting). See also *Gillette v. United States*, 401 U.S. 437, 453 (1971); *Abington School District v. Schempp*, 374 U.S. 203, 294-99 (1963) (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961). Like the exemption for conscientious objectors from the draft, §53-303e reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience.

The court below found that the "unmistakable purpose of [§53-303e] is to allow those persons who wish to worship on a particular day the freedom to do so." (Pet.App. at 14a). Without further discussion, it concluded that the measure did not have a secular purpose. It ignored the fact that government may validly seek to equalize employment oppor-

tunity by minimizing the discriminatory impact of employment practices upon religious individuals.

(2) *Effect.* Section 53-303e does not have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another. It does not confer a benefit on those accommodated, but rather relieves individuals of a special burden that others do not suffer by permitting them to fulfill their employment obligations without violating their religion. The fact that some faiths have more or different kinds of religiously dictated observances than others does not invalidate a law that applies to all equally.

This Court has made it clear that a law does not violate the Establishment Clause merely because it confers incidental or indirect benefits upon religious institutions. *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 771-72; *McGowan v. Maryland*, *supra*, 366 U.S. at 443-44. Any benefit to religion conferred by §53-303e is incidental—certainly as incidental as the benefit conferred by Sunday closing laws which this Court upheld in *McGowan*, *supra*. Neither religious activities nor religious institutions are directly sponsored or subsidized by §53-303e. A sabbath observer freed from work on his or her sabbath because of the law may go to a religious service or not. And, the sabbath observer will not be paid for the hours he or she does not work.

The court below found that §53-303e conferred a benefit on "an explicitly religious basis" because "[o]nly those employees who designate a Sabbath are entitled not to work on that particular day. . . ." (Pet. App. at 15a). But religious accommodations have been upheld by this Court against Establishment Clause challenge—even though they, like §53-303e, are keyed to a "religious" basis. See, e.g., *Gillette v. United States*, *supra*, 401 U.S. at 452 n.17 (draft exemptions

for conscientious objectors); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemptions for religious organizations).

(3) *Entanglement.* Section 53-303e presents no danger of an excessive entanglement of government and religion. It establishes no administrative relationships between government and religious institutions; individuals, not religious institutions, are the statute's intended and actual beneficiaries. The government is required only to ascertain whether an individual sincerely believes that his religion compels him or her to observe a particular day as a sabbath. This is a question of credibility with which government agencies and courts deal frequently, *United States v. Ballard*, 322 U.S. 78 (1944), and it is essentially the same determination required in implementing other religious exemptions. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Gillette v. United States*, *supra*; *Walz v. Tax Commission*, *supra*; *Sherbert v. Verner*, 374 U.S. 398 (1963).

The court below found excessive entanglement because it concluded that "[i]nevitably, as employers challenge the sincerity of employees' Sabbath observance, the [state's] inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may be labeled 'observance of Sabbath'." (Pet.App. at 15a-16a). That analysis misses the mark. The Establishment Clause prohibits only excessive government entanglement. *Walz v. Tax Commission*, *supra*, 397 U.S. at 674-75. Section 53-303e will not subject religious institutions to the sort of "comprehensive, discriminating, and continuous [governmental] surveillance" that the Supreme Court has found impermissible. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Rather, §53-303e requires only a finding whether the day in question is the employee's sabbath. In most cases, the issue will not be in dispute. In no case will §53-303e require more government involvement in re-

ligion than the concededly nonexclusive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. *Walz v. Tax Commission*, *supra*, 397 U.S. at 674-76; *id.* at 698-99 (opinion of Harlan, J.). See also *Thomas v. Review Board*, *supra*; *Gillette v. United States*, *supra*; *Sherbert v. Verner*, *supra*.

C.

THE DECISION OF THE CONNECTICUT SUPREME COURT FLATLY CONTRADICTS THE HOLDINGS OF THIS COURT IN *SHERBERT V. VERNER*, 374 U.S. 308 (1963), AND ITS PROGENY.

In *Sherbert v. Verner*, 374 U.S. 308 (1963), a pre-Title VII case, this Court held that the Free Exercise Clause mandated state accommodation of the religious beliefs of a sabbath observer. Sherbert, a Sabbatharian, had worked for thirty-seven years in a textile mill when, because of a work schedule change, she was required to work on Saturdays. She refused and was fired. When she filed a claim for unemployment compensation, South Carolina's Employment Security Commission denied the claim, citing her unwillingness to accept Saturday work. Sherbert sued the Commission, charging a violation of her right to the free exercise of her religion, but she lost in the state courts.

This Court reversed, finding that the pressure upon Sherbert to forgo the practices of her religion was "unmistakable." 374 U.S. at 404. South Carolina could not "constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions. . . ." *Id.* at 410. The Court conceded that its decision conferred a benefit on Sherbert because she was a Sabbatharian, but it saw no Establishment Clause problem:

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day

Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatharians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.¹⁰

The *Sherbert* Court's Establishment Clause holding is relevant to the case at hand. In both cases, absent accommodation of the sabbath observers, an apparently neutral policy would produce a coercive burden on the free exercise of religion. Thus, in §53-303e, the Connecticut legislature merely has forbidden the type of discrimination highlighted by *Sherbert*: if an employer discharges an employee for refusing to work on his or her sabbath, the employer has, in fact, discharged the employee because he or she is a sabbath observer; hence, the employer is guilty of illegal religious discrimination. Section 53-303e does nothing more than extend to the private sector the neutrality preserved in the public sector by *Sherbert*. If it is not an "establishment of religion" for Connecticut *itself* to accommodate sabbath observers as part of its unemployment compensation program, then it cannot be an "establishment of religion" for the state to require private employers to make the same accommodation.

Connecticut is not required to ensure in the private sector the same degree of accommodation of religion that it must provide in the public sector—but *Sherbert* and decisions of

¹⁰*Id.* at 409. This Court reaffirmed *Sherbert* (with only one Justice dissenting) in *Thomas v. Review Board*, 450 U.S. 707 (1981). The *Thomas* Court quoted the passage in text approvingly. 450 U.S. at 719-20.

this Court following it make it clear that the Establishment Clause does not prohibit it from doing so. *Thomas v. Review Board*, 450 U.S. 707, 719-20 (1981); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 n.22 (1972); *Walz v. Tax Commission*, *supra*, 397 U.S. at 668, 673 (1970). See also, *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). This Court has mapped out a zone of legislative discretion where accommodation of religion is neither required nor forbidden. See generally L. Tribe, *American Constitutional Law* §§14.4 through 14.7 (1978). In the case below, the Connecticut Supreme Court did not even mention *Sherbert* or the cases following it—and by its decision the Connecticut court flatly contradicted this Court's holdings in those cases.

D.

**THIS CASE PROVIDES AN OPPORTUNITY FOR
THIS COURT TO CONSIDER AN ISSUE OF VITAL
NATIONAL IMPORTANCE—THE LEGITIMACY OF
FEDERAL AND STATE EFFORTS TO
ACCOMMODATE RELIGIOUS INTERESTS OF
EMPLOYEES IN THE WORKPLACE.**

In *Zorach v. Clauson*, *supra*, 343 U.S. at 313-14, this Court indicated:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous in-

difference to religious groups. That would be preferring those who believe in no religion over those who do believe.

This passage from *Zorach* is not an isolated utterance. Many of this Court's decisions indicate that it is permissible for the government to accommodate religion.¹¹ Accordingly, several states and the federal government have adopted measures designed to accommodate religion—including measures designed to accommodate religion in the workplace. See IV-A, *supra*.

The decision of the Connecticut Supreme Court invalidating §53-303e threatens to destabilize the constitutional position not only of that provision but also of other provisions described above which are designed to foster the values of religious pluralism in the workplace.¹² While *Sherbert* and

¹¹ *McDaniel v. Paty*, *supra*, 435 U.S. at 639 (Brennan, J., concurring). See, e.g., *Mueller v. Allen*, ____ U.S. ____, 103 S.Ct. 3062 (1983) (state tuition tax credits for parents of parochial school children); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from federal unemployment taxes); *Gillette v. United States*, *supra* (exemptions from military service for religious conscientious objectors); *Walz v. Tax Commission*, *supra* (tax exemptions for religious institutions).

¹² In a submission to this Court in an unrelated case, the Solicitor General of the United States expressed alarm at the possible ramifications of the Connecticut Supreme Court's decision:

[The] provisions of Title VII require employers to make "reasonable accommodation," short of "undue hardship," to the religious needs and practices of their employees. For example, an employer must make reasonable accommodation to a Sabbatharian employee's desire not to work on

its progeny, as well as the Establishment Clause decisions of this Court, certainly authorize §53-303e, see IV-B and IV-C, *supra*, it is clear (in light of the strained and overly literal interpretation of the Nyquist three-part test offered in the opinion of the Connecticut Supreme Court below) that further instruction from this Court on the permissible extent of government accommodation of religion would be useful.

Saturdays, even though there is no comparable obligation to accommodate the desire of another employee, based on nonreligious grounds, not to work on Saturdays. See 118 Cong. Rec. 705 (1972) (statement of Sen. Jennings Randolph). We were dismayed to learn that a court recently struck down a provision of state law similar to these religious accommodation provisions of Title VII, applying essentially the same approach to the Lemon test as was applied by the court below. *Caldor, Inc. v. Thornton*, 191 Conn. 336, 464 A.2d 785 (1983).

Brief for the United States as Amicus Curiae in *Wallace v. Jaffree et al.* (#83-812) at 12-13 n.11 (emphasis added).

CONCLUSION

We respectfully request the Court to grant the Petition for Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1983

ESTATE OF DONALD E. THORNTON, Petitioner

v.

CALDOR, Inc., Respondent

BRIEF IN SUPPORT OF THE PETITION FOR
CERTIORARI

APPENDIX

APPENDIX A

CONNECTICUT GEN. STAT. §53-303e

MORE THAN SIX DAYS EMPLOYMENT IN CALENDAR WEEK PROHIBITED. EMPLOYEE OBSERVANCE OF SABBATH. EMPLOYEE REMEDIES.

(a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.

(b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

(e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

APPENDIX B

NEW YORK EXEC. LAW §296(10)

(a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any persons in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.

(b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such persons as leave taken without pay.

AMICUS CURIAE

BRIEF

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No. 83-1158

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ALEXANDER L. STEVENS
CLERK

ESTATE OF DONALD E. THORNTON
Petitioner

v.

CALDOR, INC.
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Connecticut

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE COUNCIL OF STATE GOVERNMENTS,
THE INTERNATIONAL CITY
MANAGEMENT ASSOCIATION,
THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES
AND THE NATIONAL CONFERENCE
OF STATE LEGISLATURES
AS AMICI CURIAE IN SUPPORT OF THE PETITION
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QUESTION PRESENTED

Whether the Establishment Clause is violated by a state law which, like a counterpart federal law previously upheld by courts of appeal, prevents private employers from adopting practices that discriminate against employees who observe their Sabbath.

IN THE
Supreme Court of the United States
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On Petition for a Writ of Certiorari
to the Supreme Court of Connecticut

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Council of State Governments, the International City Management Association, the National Association of Counties, the National League of Cities, and the National Conference of State Legislatures respectfully move this Court, pursuant to Rule 36, for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari.*

* Petitioner, Estate of Donald E. Thornton, and intervenor, State of Connecticut, have consented to the filing of this brief. Respondent Caldor, Inc., has not, and it is therefore necessary to request leave to file.

The amici are organizations that represent state and local governments located throughout the United States. Amici and their members have a vital interest in legal questions affecting such governments. This case presents an issue of great importance concerning the authority of these governments to enact measures which effectively eradicate discrimination.

States have legislatively proscribed many forms of invidious discrimination for over a century, long before the federal government's power to do so was firmly established by this Court. The state proscriptions include bars against religious discrimination in employment: many state and local governments have laws which, like the statute held unconstitutional below, assure equal employment opportunity for all citizens regardless of their religious practices. Because such a law has been struck down in this case, amici seek permission to submit this brief to assist the Court in considering the issues raised by this litigation, issues which have broad implications for the power of state and local governments to proscribe religious discrimination.

Respectfully submitted,

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February, 1984

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OF STATE LEGISLATURES
AS AMICI CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI

The interest of the amici is detailed in the motion accompanying this brief.

STATEMENT

1. Donald Thornton began working as a department manager for respondent, Caldor, Inc., the operator of a

chain of retail department stores in Connecticut, in 1975. At that time, in compliance with Connecticut's Sunday closing laws, Caldor's stores were not open for business on Sunday. In 1976, the state legislature modified the closing laws. The new legislation included the employee protection provision whose validity is at issue in this case, Conn. Gen. Stat. § 53-303e. It provides that no employer may require an employee engaged in a commercial occupation to work more than six days a week. It also provides that no employer can require an employee to work on the latter's Sabbath, and that an employee's refusal to work on his Sabbath shall not be grounds for dismissal. *Id.* at § 53-303e(b).

In 1977, following the invalidation of portions of the Sunday closing laws by the Connecticut Supreme Court, Caldor began operating its Connecticut stores on Sundays. Caldor required department managers like Thornton to work one Sunday out of four. In November of 1979, Thornton informed Caldor that he could not continue to work on Sunday, because that day was his Sabbath. Caldor suggested that he transfer to a supervisory job in Massachusetts, where he would not be required to work on Sunday, but he rejected the suggestion because of the distance and hardship involved in commuting, or moving, to Massachusetts. Over Thornton's objection, Caldor then demoted him to a non-supervisory position at his regular location. In that position, Thornton was not required to work on Sunday, but was forced to suffer a decrease in pay of almost 50 percent, from \$6.46 to \$3.50 per hour. Because the reduction in pay was unacceptable, Thornton resigned and shortly thereafter appealed Caldor's action to the Connecticut state board of mediation and arbitration, alleging wrongful discharge under General Statutes § 53-303e(b).

2. The board of mediation determined that Thornton had been "discharged" in violation of § 53-303e(b) and

it issued an award in his favor.¹ Caldor filed an application with the trial court to vacate the arbitration award, and Thornton filed a cross-application to confirm it. The trial court confirmed the award. It concluded that the board was correct in finding that Caldor's actions violated § 53-303e(b). Applying a three-part test which was first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court rejected Caldor's contention that the statutory provision violates the Establishment Clause of the First Amendment. The court upheld the statute's constitutionality because it found that the provision reflects a clearly secular legislative purpose, that its primary effect is not to advance religion, and that it does not foster an excessive government entanglement with religion.

3. The Connecticut Supreme Court affirmed the holding that, in demoting Thornton for refusing to work on his Sabbath, Caldor had violated § 53-303e(b). Nonetheless, the court directed that the arbitration award be set aside, ruling that the employee protection provision violates the Establishment Clause under the three-part test. The court recognized that the statute, which mandates that no employee may be compelled to work more than six days per week, does not favor one religion over another or provide direct aid to any religious institution. Nonetheless, the court held that the statute lacks a secular purpose, and that its effect is to advance religion, because it allows workers who observe the Sabbath to designate it as their day off, whereas employees who do not observe a Sabbath cannot designate their day off.

Finally, because the state board of mediation and arbitration may be required to decide whether an employee is

¹ The board declined to address Caldor's contention that the statute was unconstitutional under the Establishment Clause of the First Amendment, viewing its authority as only "quasi-judicial" and not extending to the determination of the constitutionality of § 53-303e(b).

sincere when he designates a day off as his Sabbath, the Connecticut Supreme Court held that the statute's enforcement mechanism will foster excessive government entanglement with religion.

REASONS FOR GRANTING THE WRIT

For over a century, state governments have taken the lead in preventing private parties from discriminating against their fellow citizens on the basis of a variety of invidious factors such as race, sex, national origin, or religion. The decision of the Connecticut Supreme Court, however, renders the state powerless to proscribe one of these forms of discrimination, religious discrimination in employment. For under the court's ruling, states cannot ban work rules that create such discrimination or that raise barriers to the exercise of religious freedom. In addition, the Connecticut court's holding conflicts with this Court's consistent position that laws providing for accommodations of religion are permissible. It also conflicts directly with the decisions of several federal courts of appeal and state supreme courts which have upheld the constitutionality of laws similar to the one at issue here. For these reasons, this Court should grant review.

A. The Lower Court's Decision Precludes States From Exercising Their Longstanding Power to Guarantee That Citizens Have Equal Rights Regardless of Religious Differences.

Under long-established principles, the state and federal governments have the authority to eliminate numerous forms of discrimination. This authority was initially exercised by state governments; subsequently the federal government exercised it also. The decision below, however, precludes governments from exercising this authority in the area of religious discrimination in employment.

In accordance with historical power, state governments have enacted laws to eradicate private discrimina-

tion against individuals since the latter part of the nineteenth century. These laws ban discrimination based on invidious factors such as race, national origin, sex, and religion. Thus, as early as 1876 this Court declared:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.

United States v. Crookshank, 92 U.S. 542, 555 (1876). Seven years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court reaffirmed that the states have the authority to prevent private acts of racial discrimination, though at that time the federal government lacked such power.⁵

In pursuit of their right to prohibit invidious discrimination, states have specifically banned private religious discrimination in employment. Thus, like Connecticut, many state legislatures have enacted laws barring work rules that compel religious practitioners to choose between their livelihood and observance of their religious beliefs.⁶

The federal government, too, has acted against private religious discrimination in employment. Thus, Congress has enacted a statute that prohibits such discrimination by requiring employers to reasonably accommodate the religious practices of their employees. Section 703(j) of

⁵ The federal government's power was not firmly established until the mid-twentieth century. See, *United States v. Gorum*, 285 U.S. 745 (1932); *Hart of Atlanta Motel v. United States*, 379 U.S. 361 (1964).

⁶ E.g., Alaska Stat. § 18.80.009(b); Ariz. Rev. Stat. Ann. § 41-1401(6); Ky. Rev. Stat. § 244.000(B); Mass. Gen. Laws Ann. Ch. 181B, § 4(1A); N.H. Rev. Stat. Ann., § 334-A:3(4) (incorporating federal law); N.Y. Exec. Law § 296(10); Pa. Rev. Stat. Ann. tit. 43, § 905.1 (public employees); S.C. Code Ann. § 1-13-80(h); Va. Code Ann. §§ 40.1-28.1 to 40.1-28.3; W. Va. Code Ann. §§ 61-10-85 to 61-10-87.

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Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (& Supp. V) § 2000e(j).⁶

The decision of the court below is contrary to the established governmental practice of prohibiting private religious discrimination in employment. Because most employees work for private employers, the decision opens the door to widespread discrimination against religious practitioners and to extensive interference with the constitutionally guaranteed free exercise of religious beliefs. The problem becomes more exacerbated as businesses are increasingly open every day of the week, presenting ever more employees with the Hobson's choice of forsaking their religious beliefs or losing their jobs. For these reasons, the decision below warrants plenary review by this Court. Such review is the more necessary because, as developed *infra*, the opinion of the Connecticut court directly conflicts with this Court's decisions concerning religious freedom, and with decisions of federal courts of appeal and state supreme courts on the precise issue involved here.

B. The Lower Court's Decision Is In Direct Conflict With This Court's Rulings That Governmental Accommodations of Religious Practice Do Not Violate the Establishment Clause.

1. This Court has repeatedly held that governmental accommodations of religious practice do not violate the Establishment Clause. Thus, the Court has said states may allow Sabbatharians to keep their stores open on Sunday in contravention of otherwise applicable closing laws. *Brownfield v. Brown*, 366 U.S. 599, 608 (1961). It has

⁶ Title VII of the Civil Rights Act proscribes discrimination by an employer or labor organization because of religion. Section 2000e(j) defines religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship in the conduct of an employer's business."

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held that states may provide released time from public schools for religious instruction. *Zorach v. Clausen*, 343 U.S. 301 (1952). It has ruled that the federal government may exempt religious objectors from the draft. *Gillette v. United States*, 491 U.S. 437 (1971).⁷

Indeed, the tradition of accommodating religious belief is so strong that at times the Court has held that government *must* do so in order to satisfy the Free Exercise Clause. Thus, it has ruled that states must exempt Sabbatharians from provisions in unemployment compensation laws that could compel them to accept jobs requiring work on their Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963). It has also held that Jehovah's Witnesses must be exempted from provisions in the unemployment compensation laws that could require them to work in the war munitions industry in violation of their religious beliefs. *Thomas v. Review Board*, 450 U.S. 707 (1981). Similarly, the Court has held that states must exempt Amish children from compulsory school attendance laws in order to allow the Amish to freely exercise their religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

This Court's cases thus establish that it is constitutional for government to accommodate religious practices. Such accommodations are permissible because they do not infringe anyone's religious liberties and because they manifest "neutrality in the face of religious differences." *Sherbert v. Verner*, *supra*, 400 U.S. at 409.⁸ It is an

⁷ In *Gillette*, the Court noted "it is hardly impermissible for [government] to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'tolerating minority status with the division of conscience.'" 491 U.S. at 438, quoting *United States v. McElroy*, 393 U.S. 465, 484 (1968) (Hughes, C. J., dissenting).

⁸ Under the Court's holdings in *Sherbert* and *Thomas*, Connecticut could not constitutionally have required Thornton to accept work on Sunday as a pre-condition to receiving unemployment benefits because that would betray its obligation of neutrality and violate

lawful for government to require private employers to neutrally accommodate religious practices as for government itself to do so. For since religion is not "established" when government itself accommodates those practices, it is no more "established" when government simply requires that others too should accommodate them. Either way, government is doing no more than neutrally securing that the right to freely exercise one's religion shall be meaningful.⁸ In other areas, such as racial discrimination, government has given substance to constitutional rights by protecting them against private action as well as governmental action.⁹ Government can do the same in the area of religious discrimination.

2. The court below ignored the foregoing principle, which cautions that Conn. Gen. Stat. § 13-300e(b) is

the Free Exercise Clause. It would be anomalous if the Free Exercise Clause required Connecticut to expand public choice by granting Thoreau unemployment benefits, but the Establishment Clause prevented Connecticut from helping him off the unemployment rolls by mandating that his employer accommodate his religious practice. But that is precisely the result of the Connecticut Supreme Court's holding in this case.

⁸ Discarding a point not reached by the majority in *Free World Action, Inc. v. Marshall*, 400 U.S. 48 (1977). Justice Marshall, *Post n. Marshall*, asserted that it is "beyond dispute" joined by Justice Brennan, that it is "beyond dispute" joined by Justice Marshall, that an employer can be required to exempt religious observers from work rules in order to facilitate exercise of their religious beliefs. Citing *Brennan, Sherbert and their progeny*, Justice Marshall observed that if a state does not establish religion by requiring religious practitioners from obligations under the state, it is difficult to see how it does so "by requiring employers to do the same respect to obligations under the employer". *Id.* at 50-51 (Marshall, J., dissenting).

⁹ See *United States v. O'Brien*, supra, 393 U.S. at 380-384 (Brennan, J., concurring in part and dissenting in part) (in order to fully protect constitutional rights the Fourteenth Amendment gives Congress power to punish private conduct that interferes with those rights).

constitutional under the Establishment Clause. Instead, it utilized only the *Lemon* three-part test, which it regarded as the sole touchstone of constitutionality.¹⁰ However, as this Court recently reaffirmed, the *Lemon* test is "no more than a helpful signpost" in dealing with Establishment Clause challenges.¹¹ *Mueller v. Allen*, — U.S. —, 103 S.Ct. 3062, 3066 (1983), quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973). It is not the sine qua non of constitutionality. Indeed, in its recent decision in *Marsh v. Chambers*, — U.S. —, 103 S.Ct. 3330 (1983), this Court wholly eschewed the *Lemon* test in favor of a historical appraisal of the challenged practice and a practical evaluation of whether the practice infringes interests traditionally protected by the First Amendment.

Like the *Marsh* Court, the court below should have devoted its attention to a practical evaluation of whether the state's conduct infringes interests traditionally protected by the First Amendment, instead of devoting exclusive attention to a three-part test. A practical evaluation would have shown that, consistent with the Court's decisions in *Brennan, Sherbert, Thomas, Yoder, and Gillette*, mandatory accommodations of religious practices are entirely consistent with this country's heritage of religious pluralism, do not infringe First Amendment interests, and are constitutional.

C. The Decision Below Is in Direct Conflict With the Decisions of Federal Courts of Appeal and State Supreme Courts, Upholding Analogous Anti-Discrimination Provisions.

Even if the *Lemon* three-part test is applied, plenary review is warranted because the decision of the Con-

¹⁰ Under that test, in order to pass constitutional muster, a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion. 403 U.S. at 612-613.

ticut court below is in direct conflict with every federal court of appeals and state supreme court which has considered the issue involved here.¹⁰

Several federal courts of appeal have specifically considered whether the Establishment Clause is violated by the requirement in Section 701(j) of the Civil Rights Act of 1964, that employers must accommodate their employees' observance of the Sabbath and religious holidays. The courts of appeal have unanimously ruled this statutory requirement constitutional under the *Lemon* criteria. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), rev'd on other grounds, 432 U.S.

¹⁰ The federal courts of appeal have ruled the religious accommodation requirement of Title VII of the Civil Rights Act of 1964 is constitutional under the three-part test. *McDaniel v. Ebasco International Inc.*, 636 F.2d 34 (6th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1982); *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), vacated and remanded on other grounds, 433 U.S. 903 (1977).

State supreme courts, applying the three-part test, have upheld identical state religious accommodation requirements. *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W. 2d 350 (Ky. Ct. App. 1982), cert. denied, 108 S.Ct. 3115 (1983); *Rankins v. Commission on Professional Competency*, 24 Cal. 3d 167 (1979), appeal dismissed, 444 U.S. 986 (1980).

One federal court of appeals has viewed the issue of whether § 701(j) of the Civil Rights Act is constitutional as foreclosed by this Court's dismissal of the appeal in *Rankins*, *supra*. *Nottelson v. Smith Steel Workers*, *supra*, 643 F.2d at 453. In *Rankins*, the California Supreme Court found that the state constitutional requirement that an employer reasonably accommodate an employee's desire to observe his religious holidays does not violate the Establishment Clause.

63 (1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), vacated and remanded on other grounds, 433 U.S. 903 (1977). Similarly, state supreme courts have held that identical state statutory requirements are constitutional under the *Lemon* three-part test. *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W. 2d 350 (Ky. Ct. App. 1982), cert. denied, — U.S. —, 108 S.Ct. 3115 (1983); *Rankins v. Commission on Professional Competency*, 24 Cal. 3d 167 (1979), appeal dismissed, 444 U.S. 986 (1980).

The federal and state courts which have upheld identical statutes are in conflict with the court below on every aspect of the *Lemon* test. First, they have ruled that a legitimate secular purpose is served by laws requiring employers to reasonably accommodate employees' religious practices, and that the primary effect of these laws is also secular. For the purpose and effect of the laws are to bar discrimination in employment by preventing employers from imposing work rules which, though purportedly neutral, in fact have a discriminatory impact on religious practitioners. *Cummins v. Parker Seal Company*, *supra*, 516 F.2d at 552; *Hardison v. Trans World Airlines*, *supra*, 527 F.2d at 44; *Rankins v. Commission on Professional Competency*, *supra*, 24 Cal. 3d at 178. The other federal and state courts have held that the laws are not intended to advance religion. Nor do they involve "sponsorship, financial support, and active involvement of the sovereign in religious activity," which are the main concerns against which the Establishment Clause guards. *Cummins*, *supra*, 516 F.2d at 553; *Hardison*, *supra*, 527 F.2d at 44; *Rankins*, *supra*, 24 Cal. 2d at 178; all citing *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

Also, the other courts have specifically recognized that the statutes do not raise the spectre of excessive government entanglement with religion. For any governmental determination of whether an individual is protected by

one of the statutes requires no more governmental involvement in religion than a similar determination of whether an individual meets the statutory criteria for conscientious objector status, *Gillette v. United States*, *supra*, or whether a religious institution meets the statutory criteria for a tax exemption, *Wals v. Tax Commission*, *supra*. Thus the statutes simply do not create the kind of "comprehensive, discriminating, and continuing" involvement between the state and religious institutions which the Establishment Clause forbids. *Cummins*, *supra*, 516 F.2d at 553-554; *Hardison*, *supra*, 527 F.2d at 44; both citing *Lemon v. Kurtzman*, *supra*, 403 U.S. at 619.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1984

RESPONDENT'S BRIEF

(6)
U.S. Supreme Court, U.S.
FILED
FEB 13 1964
ALEXANDER L. STEVENS,
CLERK

NO. 63-1156

In The

Supreme Court Of The United States

OCTOBER TERM, 1963

ESTATE OF DONALD E. THORNTON,
Petitioner,

v.

CALDOR, INC.,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT**

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED:

May a State Statute confer on "Sabbath observers," who already have the protection of the Federal and State civil rights laws, a separate absolute right not to work on the employees' Sabbath, regardless of the effect on their private employer's business or the impact on other employees, and without any provision for any accommodation process?

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Supreme Court Of The United States

OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,
Petitioner,

v.

CALDOR, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 24.1, the Respondent, Caldor, Inc.,* respectfully submits this brief in opposition to the Petition for Certiorari seeking review of the decision of the Connecticut Supreme Court as reported in 191 Conn. 336, 464 A. 2d 785 (1983).

* Caldor, Inc. is a wholly owned subsidiary of Associated Dry Goods Corp., a publicly held and publicly traded Virginia corporation.

STATEMENT OF THE CASE:

The undisputed "underlying facts" are set forth in the opinion of the Supreme Court of Connecticut, 191 Conn. 336, 337-339, 464 A. 2d 785 (1983). (See also Petitioner's Appendix A pages 2a-3a.)

The statute in question was enacted in 1976. There is no legislative history of this statute. It was incorporated in a bill that attempted to modernize and clarify the Connecticut Sunday Closing or Common Day of Rest Law. P.A. 76-415 as amended by P.A. 76-435, Sec. 7. In 1978, various clarifying amendments were made, none of which are pertinent to this proceeding. P.A. 78-329.¹

Section 1 of the 1976 Act is the core section codified in Sec. 53-302a. Section 2 of the 1976 Act concerns other holidays and is codified in Sec. 53-303b. Section 3 of the 1976 Act provides the penalty for violation of the new law; it is codified in Sec. 53-303c. Section 4 of the 1976 Act provides for injunctive relief to compel compliance with the law; it is codified in Section 53-303d.

Subsection (a) of Section 5 of the 1976 Act provides that no employee shall be required to work more than six days in any calendar week. There was a similar provision in the prior law (repealed Section 53-302). This provision is codified in subsection (a) of Section 53-303e.

Subsections (b) through (d) of Section 5 of the 1976 Act contain the "Sabbath provisions" here involved. These are codified in subsections (b) through (d) of G.S. 53-303e.

¹ The 1978 Act repealed the prior Sunday closing law then codified in Sections 53-300, 301, 302 and 303 of the General Statutes. These superseded provisions are still contained in the bound volume of the General Statutes. As appears therefrom, there was no provision in the law prior to 1978 analogous to subsections (b) through (d) of Subsection 53-303e.

Subsection (e) provides for a fine of \$200 for violation of subsections (a) through (d).²

In April, 1979, the Supreme Court of Connecticut held unconstitutional what it described as the "core section" of the Sunday Closing Law, G.S. Sec. 53-302a. *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 310, 417 A. 2d 343 (1979).

Following this decision, Sunday became a regular business day.

The Sunday Closing Law, of which Section 53-303e was one small part, is codified in the Connecticut penal laws. Connecticut has an entirely separate Fair Employment Practices Act which was first enacted in 1947. It was originally codified in Connecticut's Labor Laws as Chapter 563 of Section 31 of the Connecticut General Statutes. In 1981, the Fair Employment Practices Law was transferred to Section 46a as Chapter 814c under the new rubric of "Human Rights and Opportunities Act." This law prohibits discrimination, including religious discrimination and is enforced by much the same procedure as corresponding provisions of the Federal Civil Rights Act. See, C.G.S. §§ 46a-51 through 57, and 60a.

Section 53-303e makes no reference whatever to the Connecticut Fair Employment Practices Law nor to the comparable Federal Civil Rights Law.

The right of Thornton to seek relief under the State or Federal Civil Rights Law was never contested. In fact, respondent urged below that these civil rights laws provided the appropriate remedy; Caldor attempted to accommodate Thornton in a manner consistent with these civil rights laws. See, *Caldor, Inc. v. Thornton*, 191 Conn. at 338.

² The 1978 amendments did not change Section 53-303e. These amendments clarified the core section (53-303a), increased penalties for violation of the core section (53-303c), and expanded the persons who could sue for injunctive relief (53-303d).

This case arose only because of Thornton's claim that accommodation was not the issue — that Section 53-303e gave him the absolute right to refuse to work on Sunday or any other day he selected as his "Sabbath."

In the Supreme Court of Connecticut, petitioner went one step further. He contended that the statute gave every person in Connecticut the right to select any day of the week as a day that that particular employee would not have to work.

This startling "advance" in social legislation did not survive scrutiny by the Connecticut Supreme Court. "The defendant . . . would have this court construe the term 'Sabbath' as utilized in subsection (b) as simply a 'time of rest' without any religious overtones. We find this claim unpersuasive." *Caldor, Inc. v. Thornton*, 191 Conn. at 347, 464 A. 2d at 792.

REASONS WHY THE WRIT SHOULD BE DENIED:

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION(S) PRESENTED IN THE PETITIONS.

The question presented by the petitions⁸ is the extent to which employers must accommodate the religious practices of employees. That question was thoroughly explored by this court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Subsequently, the Equal Employment Opportunity Commission came up with revised guidelines "to clarify the obligations . . . to accommodate the religious

⁸ The petitions referred to herein are those on behalf of the Estate of Donald E. Thornton and proposed to be filed by the State of Connecticut by the new Attorney General. The office of the Connecticut Attorney General was on notice of this case throughout the Connecticut proceedings below and apparently decided not to participate in any of the prior proceedings.

practices of employees and prospective employees." 29 CFR §1605.2.

This case in no manner, shape or form questions *Hardison* or the principles of accommodation or the EEOC Religious Discrimination Guidelines. This is not, never was, and never will be an accommodation case. Yet, the petitioners talk about nothing but accommodation.

Hardison did indeed leave open for a later date the extent to which a statute "consistently with the First Amendment can [] require employers to grant privileges to religious observers as a part of the accommodation process," 432 U.S. at 91 (Marshall, J., diss. op.). But that question was not presented in this case because this statute does not provide for any "accommodation process." Accordingly, there is no reason for anyone, including the Solicitor General, to be "dismayed" by the decision of the Connecticut Supreme Court because in no way did that court strike down "a provision of State Law similar to these religious accommodations of Title VII." (See Pet. p. 8.)

The Supreme Court of Connecticut is well aware of the critical importance of the civil rights laws. See, *The Evening Sentinel v. The National Organization of Women*, 168 Conn. 26, 357 A. 2d 498 (1975). Nothing in its opinion suggests a sub silentio attack on the Connecticut or Federal civil rights laws. The petitioners have refrained from presenting the real question in this case because the question really answers itself; that is, whether a law consistent with the First Amendment can grant a right to all Lutherans to celebrate a holiday in honor of Martin Luther's birthday, a holiday to all Catholics for celebrating Pope John's birthday, etc.? It is exactly this kind of action which was required by C.G.S. §53-303e and that is why the Connecticut Supreme Court unanimously found the statute unconstitutional.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHY THIS UNIQUE STATUTE SHOULD BE CONSIDERED BY THIS COURT.

Nobody seems to know from whence this statute came. All that can be determined is that it appeared for the first time in 1976 as part of a new Sunday Closing Law. That law was intended to confirm the historic policy of the State against Sunday business and to strengthen the enforcement of the prohibitions against Sunday business. Thus, for the first time private parties were authorized to seek injunctions to enforce the laws. See, *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1978). It may well be that Section 53-303e was intended to be a further enforcement tool. After all, if your employees won't work, you cannot open in violation of the law against Sunday business.

This case only arose because the "core provision" of the Sunday Closing Law was held unconstitutional, *Caldor's, Inc. v. Bedding Barn, Inc.*, *supra*. As a result, Sunday became an ordinary retail business day. This made it necessary to have employees on Sunday, and to schedule management employees such as Thornton to work on some Sundays. It is almost inconceivable that this peculiar fact situation could ever arise again anywhere. Common sense dictates that no reasonable legislative body would pass a law giving virtually everybody the right to refuse to work on Sunday or the equally busy retail day of Saturday without any provision requiring some consideration for the need to staff the stores which are open seven days a week. How can everybody be a customer and nobody be an employee? It is precisely because of this problem that Caldor felt compelled to challenge the constitutionality of Section 53-303e.⁴ This odd statute and odd factual situation is designed for consideration by most courts and not by the Supreme Court of the United States.

⁴Caldor argued below that Section 53-303e "died" with the core section of the Sunday Closing Law of which it was an integral part. The Supreme Court of Connecticut elected not to consider this point "because of our conclusion concerning the Establishment Clause." 191 Conn. at 348, n. 2.

CONCLUSION:

Based upon the foregoing, respondent opposes the granting of the Writ of Certiorari.

RESPECTFULLY SUBMITTED,
RESPONDENT

BY /s/ Elliot B. Gervais
Elliot B. Gervais
Its Attorney

CERTIFICATION:

This is to certify that three copies of the foregoing Respondent's Brief in Opposition was mailed on February 10, 1984, postage prepaid to the following:

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/s/ Elliot B. Gervais
Elliot B. Gervais

AMICUS CURIAE

BRIEF

No. 88-1324

Office of the Clerk, U.S.

FILED

FEB 16 1984

ALEXANDER L. STEVENS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON, PETITIONER

v.

CALDOR, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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24 pp
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QUESTION PRESENTED

Whether a state statute that prohibits an employer from requiring employees to work on their designated day of Sabbath violates the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON, PETITIONER

v.

CALDOR, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the facial validity of a Connecticut statute protecting the rights of private employees to refrain from working on the day they designate as their Sabbath. The Connecticut Supreme Court struck down the statute under the Establishment Clause of the United States Constitution, as applied to the states through the Fourteenth Amendment.

In 1972, Congress enacted legislation requiring employers to make "reasonable accommodations" to the religious needs of their employees, including attempting to accommodate employees' Sabbath observances. Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j)

(1)

and 2000e-2(a)(1).⁴ The United States has a substantial interest in this case, therefore, because a decision upholding the Connecticut law, which goes beyond the religious accommodation requirements of Title VII, would *a fortiori* resolve the issue⁵ of the constitutionality of the federal law. Conversely, adoption of the reasoning of the Connecticut Supreme Court by other courts would, of necessity, prompt challenges to the validity of the religious accommodation requirements of Title VII. The constitutionality of those requirements has not been resolved by this Court.

The United States has participated as amicus curiae in three prior cases before this Court concerning the religious accommodation requirements of Title VII. See *Twaas World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Commissie*, 429 U.S. 65 (1976); *Dewey v. Reynolds Metals Co.*, 402 U.S. 609 (1971).

The United States has an additional independent interest in upholding state laws that prohibit conduct that may also be unlawful under Title VII. The statutory enforcement mechanisms of Title VII evince a strong congressional policy in favor of vigorous enforcement of nondiscrimination requirements at

⁴ In addition, guidance issued by the Office of Federal Contract Compliance Programs of the Department of Labor imposes an obligation on contractors and subcontractors on federally-assisted construction contracts to make reasonable accommodations, short of undue hardship, to the religious needs of applicants and employees, including Sabbath observance (see 41 C.F.R. 60-50.3). See also 12 C.F.R. 208.340(f)(iii) (Federal Reserve Board policy of religious accommodation); 13 C.F.R. 113.54 (Small Business Administration requirement of religious accommodations by recipients of federal financial assistance); 20 C.F.R. 1013.204(g) (religious accommodation obligations of federal agencies).

the state level. Under Title VII, where a state or local law prohibits the unlawful employment practice and establishes or authorizes a state or local authority to grant relief from such practice, no federal charges may be brought for a 60-day period. 42 U.S.C. 2000e-5(c) and (d). This enables the matter to be settled "in a voluntary and finalized manner."⁶ *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). It also enables the federal government to concentrate its enforcement resources more effectively on areas where they are needed. The United States therefore has a substantial interest in the enforceability of state laws that parallel or, as in this case, supplement the requirements of Title VII.⁷

Moreover, the broader issues raised by this case implicate many activities of the federal government that involve neutral and nonadversive means of accommodating private religious practices. These include the grant of tax preferences for religious institutions (see 26 U.S.C. 170(a) and (c)(2), 501(a) and (c)(3)), the allowance of religious holidays to federal employees (see 5 U.S.C. 5545(a)), and the exemption of conscientious objectors from military service in times of conscription (see 30 U.S.C. App. 454(j)).

The United States has participated as a party or as amicus curiae in numerous cases decided by this

⁵ The Connecticut Board of Mediation and Arbitration is not itself designated as a qualified state agency under 42 U.S.C. 2000e-5(c) (see 20 C.F.R. 1000.80), but it could file an application for designation under the standards of 20 C.F.R. 1000.20. Other state laws requiring religious accommodation in the workplace are administered by state agencies so designated by the Equal Employment Opportunity Commission.

Court under the Religion Clauses. See briefs filed by the United States as amicus curiae in *Marsh v. Chambers*, No. 82-23 (July 5, 1983); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Rosmer v. Board of Public Works*, 426 U.S. 736 (1976); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and briefs filed as a party in *United States v. Lee*, 455 U.S. 252 (1992), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

STATEMENT

Petitioner Donald E. Thornton, a Presbyterian who observed Sunday as his day of Sabbath, was employed from 1975 until March 8, 1980, as a department manager for respondent Caldor, Inc., a large, multi-state chain of department stores (Pet. App. 2a-3a).⁶ Until 1977, the State of Connecticut prohibited most employers, including respondent, from doing business on Sundays. In 1976, the General Assembly enacted legislation permitting certain classes of businesses to remain open on Sundays, but (a) guaranteed all employees at least one day off per week (Conn. Gen. Stat. § 53-300e(a) (1982)), and (b) guaranteed the right of any employee who "states that a particular day of the week is observed as his Sabbath" not to work on that day (*id.* § 53-300e(b)). The employer is prohibited from dismissing any employee because of his "refusal to work on his Sabbath" (*ibid.*). An aggrieved employee may appeal a discharge to the State Board of Mediation and Arbitration, which is empowered to "order whatever remedy will make the employee whole, including but not limited to rein-

⁶ Petitioner died in February 1982. This action for back pay and fringe benefits is being maintained by his wife.

statement to his former or a comparable position" (*id.* § 53-300e(c)).

Pursuant to this legislation, respondent began to open its doors for business on Sundays. Under a rotation system among managerial personnel, petitioner was required to work approximately one in four Sundays. In late 1979, petitioner asserted his right under Section 53-300e(b) to refrain from working on Sundays. After several meetings with petitioner, respondent refused to give him Sundays off. Instead, respondent offered him two alternatives: a transfer to a Massachusetts store, which was not open for business on Sundays, or a demotion to a nonsupervisory capacity, with a concomitant pay cut of almost \$3.00 per hour.⁷ These alternatives were not acceptable to petitioner. He therefore ceased coming to work and filed a grievance with the State Board of Mediation. Pet. App. 3a.

The Board and, subsequently, the trial court held that petitioner was discharged in violation of Section 53-300e(b), and ordered reinstatement with backpay and compensation for lost fringe benefits. The Board held that it did not have the authority to consider respondent's constitutional challenge to Section 53-300e(b), and the trial court expressly upheld the statute. Pet. App. 4a. The trial court commented that "the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice" (Pet. App. 22a).

The Supreme Court of Connecticut reversed. Applying the three-part test of *Lemon v. Kurtzman*, 403

⁷ The collective bargaining agreement in effect for nonsupervisory employees provided that they were not obliged to work on the Sabbath (Pet. App. 3a).

U.S. 602, 612-613 (1971), the Connecticut Supreme Court held Section 53-300e(b) unconstitutional on its face under the Establishment Clause of the United States Constitution. See Pet. App. 1a, 9a.⁶ The court concluded, first, that the statute does not reflect a clearly secular legislative purpose. Because the employee's right under Section 53-300e(b) is expressly predicated upon a religious concept—the Sabbath—the court found that the statute had "religious overtones" (Pet. App. 12a) and that the right "comes with religious strings attached" (*id.* at 13a). The court concluded (*id.* at 14a (footnote omitted)):

The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53-300e(b) does not pass the "clear secular purpose" test of establishment clause scrutiny.

The court found, second, that the primary effect of Section 53-300e(b) is to advance religion. The court reasoned (Pet. App. 15a):

While § 53-300e(b) does not favor one religion over another, and does not provide direct aid to religious institutions in the form of money or property, it confers its "benefit" on an explicitly religious basis. Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing. Workers who do not "observe a Sabbath" may not avail themselves of the benefit provided by the subsection, and are not entitled to take a specific day off with impunity. The inapplicable

⁶ The Connecticut Supreme Court expressly declined to consider whether Section 53-300e(b) is in violation of the Connecticut State Constitution. Pet. App. 11a n.7.

conclusion is that § 53-300e(b) possesses the primary effect of advancing religion.

Third, the court found "most troublesome" the prohibition on excessive government entanglements with religion (Pet. App. 15a). The court noted that the Board of Mediation would be required to decide the scope of religious activities which "may fairly be labeled 'observance of Sabbath,'" in order to resolve the question of the sincerity of employees' Sabbath observances (Pet. App. 15a-16a).⁷ The court concluded that this analysis would be "exactly the type of 'comprehensive, discriminating and continuing state surveillance' which creates excessive governmental entanglements between church and state" (*id.* at 16a (quoting *Lemon v. Kurtzman*, 403 U.S. at 619)).⁸

DISCUSSION

In Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e et seq., prohibits employers from taking adverse employment actions against applicants or employees on the basis of their religious observances and practices, including their observance

⁷ The court did not explain its construction of state law on this point. On its face, Section 53-300e(b) does not require any analysis of the "sincerity" of the employee's observance of the Sabbath. The statute simply requires employers to grant the day off to any "person who states that a particular day of the week is observed as his Sabbath" (emphasis added).

⁸ Associate Justice Black agreed with the majority that Section 53-300e violates the Establishment Clause, but dissented on the ground that the constitutional issue should have been raised in the first instance by the Board of Mediation (Pet. App. 15a-15a).

of a Sabbath,⁶ "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j), 2000e-2(a)(1).⁷ Congress' primary purpose in enacting the provision was to clarify that Title VII's basic prohibition against discrimination on the basis of "religion" encompasses all aspects of religious observance and practice, as well as belief, where reasonable accommodation (short of "undue hardship") is possible. Congress' attention was particularly drawn to the problem of protecting the opportunity of employees to observe their respective days of rest and worship. See *Tenley v. Martin-Marietta Corp.*, 640 F.2d 1239, 1245 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); 118 Cong. Rec. 705-706 (1972). Unlike Connecticut's Section 55-50(a), Title VII does not create an absolute right to observance of the Sabbath; it merely requires the employer reasonably to accommodate the employee's Sabbath observance if it can do so without "undue hardship."⁸

⁶ The term "Sabbath," as used in Connecticut's Section 55-50(a), refers to any religiously ordained weekly day of rest and religious observance (Pet. App. 11a-11b & n.8). The right to reasonable accommodation of the employee's religious needs under Title VII likewise applies to any "conflict between work schedules and religious practice" (29 C.F.R. 1615.11(d)(3)). The right is not restricted to those who would describe their religious observance as a "Sabbath."

⁷ Even prior to amendment of Title VII in 1972, EEOC regulations interpreted Section 701(a)(1) as requiring reasonable accommodation to employees' religious needs. 29 C.F.R. 1615.1 (1968); see *Trans World Airlines, Inc. v. Hardison*, 425 U.S. 65, 70-78 (1977).

⁸ We take no position, of course, as to whether petitioner's constructive discharge would constitute an unlawful employ-

ment discrimination. Section 55-50(a)(b) goes further. It allows employees as a matter of legal right to refrain from working on their Sabbath day, and to be free from the threat of discharge for so doing. The statute admits on its face of no exception based on "undue hardship." It thereby extends to all employees the privilege formerly accorded only those whose religious observance coincided with the Sunday closing required by Connecticut law.

The constitutionality of the religious accommodation requirements of Title VII has not been decided by this Court. See *Trans World Airlines, Inc. v. Hardison*, 425 U.S. 65 (1977) (case resolved on nonconstitutional grounds).⁹ Three courts of ap-

peal practice under Title VII. The answer to that question would hinge upon whether an accommodation to petitioner's Sabbath observance would be reasonable and could be made without "undue hardship" to respondent's business. That question is one of fact. *National v. South Steel Workers*, 643 F.2d 445, 452 (7th Cir.), cert. denied, 454 U.S. 1040 (1981).

⁹ The pre-Blodden case of this Court concerning the religious accommodation requirements of Title VII were decided by an equally divided Court. *Parker Steel Co. v. Committee*, 419 U.S. 48 (1974) (affirming a Sixth Circuit decision upholding constitutionality of Title VII religious accommodation requirements); *Dixie v. Reynolds Metals Co.*, 419 U.S. 609 (1974) (affirming a Sixth Circuit decision that Title VII, before the 1972 amendments, did not require religious accommodations, partly on ground that such accommodation would violate Establishment Clause).

Since Blodden, this Court has denied four petitions for certiorari to review decisions upholding the constitutionality of Title VII or similar state statutes. (*Karen Bakberg, Inc. v. Kentucky Council on Women Rights*, No. 45-1795 (June 25, 1980); *International Association of Machinists v. Anderson*, 454 U.S. 1148 (1980); *United Brotherhood, Local 6161 v. Ferring*, 454 U.S. 2090 (1981); *South Steel Workers v. National*,

peals have considered the question, and each has sustained Title VII against constitutional challenge. *McDonald v. Dowm International, Inc.*, 616 F.2d 34, 37 (6th Cir. 1982); *Fordy v. Martin-Marietta Corp.*, 627 F.2d 677, 680 (5th Cir.), cert. denied, 454 U.S. 1148 (1982); *Nottebohm v. Smith Steel Workers*, 643 F.2d 663, 672-673 (7th Cir.), cert. denied, 454 U.S. 1148 (1982). Contrary rulings, however, continue to appear. See *EEOC v. Sombo's of Georgia, Inc.*, 530 F. Supp. 96, 91-92 (N.D. Ga. 1981) (dictum); *Brown v. Doctor's Show Corp.*, 511 F. Supp. 109, 112 (N.D. Ga. 1981); *Garcia v. Peoples Natural Gas Co.*, 614 F. Supp. 422, 426-433 (W.D. Pa. 1979), vacated on other grounds, 613 F.2d 692 (3d Cir. 1980); *Anderson v. General Dynamics Convair Aerospace Divisions*, 619 F. Supp. 192, 199 (E.D. Cal. 1981), aff'd, 649 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Toll v. North American Rockwell Corp.*, 629 F. Supp. 763 (C.D. Cal. 1977), aff'd on other grounds, 612 F.2d 934 (9th Cir. 1979), cert. denied, 453 U.S. 929 (1982). See also *Nottebohm*, 643 F.2d at 674-675 (Pell, J., dissenting); *Cunningham v. Parker Seal Co.*, 516 F.2d 344, 356-360 (10th Cir. 1975) (Coleman, J., dissenting), aff'd by an equally divided Court, 429 U.S. 65 (1978), vacated and remanded, 433 U.S. 900 (1977). Courts may also be according Title VII an unconstitutional narrow construction, 614 U.S. 1148 (1982)), and has declined to wait for such a constitutional federal question on appeal from a state court decision regarding the constitutionality of a construction of state law parallel to Title VII. *Steubing & Green's on Professional Corporations*, 604 U.S. 100 (1979). Three justices dissented in *Steubing* and would have set the case for argument.

This is the Court's best opportunity to review a decision concerning how a state's workers' religious accommodation requirements under the Establishment Clause. No cases invalidating the Title VII requirements here come to the Court.

construction in order to obviate perceived constitutional problems (cf. *NLRB v. Catholic Bishop of Chicago*, 441 U.S. 490 (1979)). See, e.g., *Deweys v. Reynolds Metals Co.*, 429 F.2d 324, 334-335 (6th Cir. 1970) (opinion on petition for rehearing), aff'd by an equally divided Court, 462 U.S. 689 (1971); *Turpen v. Missouri-Kan.-Tex. R.R.*, 573 F. Supp. 820, 833 (N.D. Tex. 1983); see also *Nottebohm*, 643 F.2d at 678 (Pell, J., dissenting).

Against this background, the decision below—though rendered by a state court, concerning a state statute that goes further than Title VII—has serious implications and thus merits plenary review by this Court. Despite the differences between Title VII and Section 53-303e(b), it can be argued that these statutes do not differ with respect to the factors deemed dispositive of the Establishment Clause issue by the Connecticut Supreme Court: purpose, effect, and entanglement. It can be argued that both have the purpose of “allow[ing] those persons who wish to worship on a particular day the freedom to do so” (Pet. App. 14a).¹² Both “confer[] [their]

¹² The Connecticut Supreme Court's treatment of “secular purpose” misses the point. As the government has pointed out in previous cases (e.g., Br. for the EEOC in Opp. at 16-17, *International Association of Machinists v. Anderson*, 454 U.S. 1145 (1982)), the reasonable accommodation requirement of Section 701(j) serves the same legitimate purpose that is generally served by Title VII. The fact that it protects equal employment opportunity in the context of religious practices does not make its purpose impermissibly nonsecular. The purpose of Section 701(j) was not to “advance religion” but, rather, in “the spirit of religious freedom” (118 Cong. Rec. 706 (1972)), to ensure that no individual’s religious practices would unduly restrict his employment opportunities by compelling him to choose between his job and his conscience, whenever that result could be accomplished without causing “undue hardship” to others.

'benefit(s)' on an explicitly religious basis," since "[w]orkers who do not 'observe a Sabbath' may not avail themselves of the benefit provided" by the law (*id.* at 15a; cf. *Hardison*, 432 U.S. at 81). And the statutes raise the equivalent question with respect to whether an inquiry concerning the sincerity of the employees' assertion of religious observance is required (see Pet. App. 15a-16a). With respect to the reasoning of the Connecticut Supreme Court, therefore, the two statutory schemes raise many of the same constitutional questions. The decision below therefore conflicts in material respect with the decisions of three federal appellate courts cited above, and presents an opportunity for this Court to resolve the constitutional question not reached in *Hardison*.¹⁹

We believe it is time that the question of the constitutional propriety of laws requiring religious accommodation in the workplace be resolved.²⁰ An authoritative determination by this Court will remove any impediment to voluntary compliance that lingering doubts about Title VII's constitutionality may perpetuate, and will reverse the possible tendency of some courts toward an unduly narrow interpretation

¹⁹ A decision upholding Section 55-505e(b) would, we believe, apply *a fortiori* to the religious accommodation requirements of Title VII. The effect on Title VII of a decision affirming the Connecticut Supreme Court in this case would depend on the reasoning of the Court.

²⁰ While this Court's dismissal for want of a substantial federal question in *Rankins v. Comm'n on Professional Competence*, 24 Cal. 3d 107, 598 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed, 444 U.S. 986 (1979), might appear to have resolved this issue, subsequent cases have shown that doubts concerning the issue still persist. See *Tinsley v. Martin-Marietta Corp.*, 648 F.2d at 1344 n.8; *Nettelbeck*, 648 F.2d at 657-658 (Pell, J., dissenting); see also the decision below.

of Title VII, adopted for the purpose of avoiding perceived constitutional problems. Moreover, we believe that the Connecticut Supreme Court's application (we think misapplication) of the three-part test of *Lemon v. Kurtzman*, *supra*, should be corrected. The decision exemplifies a view of the Establishment Clause that is inconsistent with the very principle of religious accommodation. If the analysis typified by the decision below were generally adopted as the standard for evaluating religious accommodations, the constitutional underpinnings of Title VII—as well as many other governmental programs and activities—would be in doubt.²¹

b. A further reason for concern about the decision below is that many states, like Connecticut, have enacted religious accommodation laws applicable to the workplace.²² These provisions provide parallel or sup-

²¹ In applying the formulation of the Establishment Clause test in *Lemon v. Kurtzman*, *supra*, to cases of religious accommodation, the courts have reached widely divergent results. Compare, e.g., *Nettelbeck*, 648 F.2d at 655-656, and *Lesser v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981), with *Broadus v. Board of Education*, 626 F.2d 971, 978-979 (2d Cir. 1980), cert. denied, 454 U.S. 1129 (1981), and the decision below.

²² See Ariz. Rev. Stat. Ann. §§ 41-1401(f), 41-1403 (1980); Conn. Gen. Stat. § 55-505e (1982); Ga. Code Ann. §§ 10-1-870, 45-19-22 (1982); Ky. Rev. Stat. §§ 344.080(B), 344.080(1), 344.145(4)(a) and (b) (1975); Md. Ann. Code art. 27, § 492 (Com. Supp. 1982); *id.* at art. 49B, §§ 14-14 (1979); Mass. Gen. Laws Ann. ch. 151B, § 4.1A (West 1978); Mo. Ann. Stat. § 578.115 (Vernon 1979); N.H. Rev. Stat. Ann. § 354-A:3(4) (1968); N.Y. Exec. Law § 294.10 (McKinney 1982); Pa. Stat. Ann. tit. 43, § 955.1 (Purdum 1964); S.C. Code Ann. §§ 1-18-30(h), 1-18-80 (Law Coop. 1978); Va. Code §§ 40.1-28.2, 40.1-28.3 (1981); W. Va. Code § 61-10-27 (1977); Wis. Stat. Ann. § 111.897 (West 1974). Other state laws have been interpreted to require religious accommodation. Alaska Stat.

plemental protections to those accorded by Title VII, and are consistent with and encouraged by the federal statutory policy of fostering state and local enforcement of rights also protected by Title VII. 42 U.S.C. 2000e-5(c) and (d); see generally *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).¹⁷ These state laws have generally been upheld against Establishment Clause challenges. See, e.g., *Rankins v. Comm'n on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 996 (1979); *Kerns Bakery, Inc. v. Kentucky Comm'n on Human Rights*, 644 S.W.2d 350 (Ky. Ct. App. 1982), cert. denied, No. 82-1765 (June 20, 1983). There are various differences between Connecticut's Section 53-30(e)(b) and these other state statutes, but

¹⁷ 18-68,200 (1982), as interpreted in *Wendell v. Alaska Wood Products, Inc.*, 543 P.2d 600, 614 (Alaska 1978); Cal. Comt. Art. I, § 8, as interpreted in *Rankins v. Comm'n on Professional Competence*, 24 Cal. 3d 167, 173-174, 593 P.2d 852, 856, 154 Cal. Rptr. 907, 911-912, appeal dismissed for want of a substantial federal question, 444 U.S. 996 (1979); Iowa Code Ann. § 801A.6(1)(a) (West 1978), as interpreted in *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 896, 902 n.1 (Iowa 1983); Me. Rev. Stat. Ann. tit. 5, § 4872(1)(A) (1979), as interpreted in *Maine Human Rights Comm'n v. Local 1981, United Paperworkers International Union*, 898 A.2d 208, 278 (Me. 1978). In other states, religious accommodations are required by guideline or regulation. See [State Laws] Fair Emp'l Prac. (BNA) 458:1141 (Colo. Sept. 25, 1980); id. at 458:1798 (D.C. June 11, 1978); id. at 458:2754 (Ill. Dec. 18, 1978); id. at 458:3301 (Kan. May 1, 1978); id. at 458:1094 (Mich. Dec. 18, 1978); id. at 458:1991 (Mont. July 14, 1980); id. at 458:2551 (Nev. Apr. 6, 1981); id. at 457:585-457:596 (Okla. Feb. 25, 1977); id. at 457:174 (S.D. Dec. 16, 1979); id. at 457:1887 (Tenn. Jan. 18, 1979).

¹⁸ See also 42 U.S.C. 2000e-7 and 2000e-4.

the reasoning of the court below would apply equally to each of them. The conflict created by the decision below thus has serious consequences for the cooperative federal-state enforcement of rights guaranteed under Title VII.

2. The decision below conflicts with two lines of decisions by this Court.

First, the decision is at odds with *Sherbert v. Verner*, 374 U.S. 398 (1963), recently affirmed in *Thomas v. Review Board*, 450 U.S. 707 (1981). See also *Rankins v. Comm'n on Professional Competence*, 444 U.S. 996 (1979) (dismissing for want of a substantial federal question an Establishment Clause challenge to a state law interpreted to require employers to make reasonable accommodation to employees' religious observances); *Zorach v. Clausen*, 343 U.S. 306 (1952). In *Sherbert*, this Court held that the extension of unemployment benefits to persons who leave their jobs because they would otherwise be required to work on their Sabbath day, where employees who voluntarily leave their jobs for non-religious reasons would receive no such compensation, does not violate the Establishment Clause. 374 U.S. at 409-410. Indeed, the Court held that a state is constitutionally required under the Free Exercise Clause to extend unemployment benefits in such circumstances. It can hardly be thought that the Establishment Clause forbids Connecticut from extending to the private workplace the same sort of accommodation to Sabbath observance that this Court required of South Carolina in *Sherbert*. Significantly, even the dissenters in *Sherbert* and *Thomas* would find religious accommodations of this sort permissible under the Establishment Clause, although not required under the Free Exercise Clause. See *Sherbert*, 374

U.S. at 422-423 (Harlan, J., dissenting); Thomas, 430 U.S. at 723 (Rehnquist, J., dissenting).¹⁰

Second, the decision below is at odds with decisions of this Court regarding Sunday closing laws. In *McGowen v. Maryland*, 264 U.S. 420 (1924), this Court upheld a state law requiring businesses to close on Sundays. In *Arlon's Department Store, Inc. v. Kennedy*, 271 U.S. 216 (1922), this Court dismissed for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of those who celebrate the Sabbath on other days. And in *Brownfield v. Brown*, 266 U.S. 599, 608 (1924), Chief Justice Warren observed that it "may well be the wiser solution to the problem" for a state to allow persons who, "because of religious conviction, observe a day of rest other than Sunday" to open their businesses on Sundays and take their day off on their Sabbath. The effect of these decisions is to make clear that there is no constitutional bar to state laws that permit persons the privilege of selecting their day off on religious grounds, even though persons with equally strong—but nonreligious—preferences are accorded no such privilege.

3. In *Zorach v. Clausen*, 343 U.S. at 314, this Court affirmed the legitimacy of governmental efforts to "accommodate the public service to [our people's] spiritual needs." By contrast, the approach of the court below would make virtually every form of religious accommodation constitutionally suspect.

Laws such as Title VII and Connecticut's Section 51-200a(b) reflect, we believe, an admirable tolerance

¹⁰ Indeed, the opinion of the Connecticut Supreme Court reflects nearly exactly the approach to the Establishment Clause criticized by Justice Rehnquist in his Thomas dissent, 430 U.S. at 723.

for the diversity of religious practices in this country and a willingness to enable religious believers—particularly those of minority views—to overcome the burdens their religious observances would otherwise place on them in the workplace. *Twomey v. Morris-Marietta Corp.*, 648 F.2d at 1244-1245. As Justice Marshall has stated, "our hospitality to religious diversity"—as reflected in such statutes—is "one of this Nation's pillars of strength." *Henderson*, 432 U.S. at 97. In crafting and enforcing this statute, the State of Connecticut plainly is not "fostering the 'Establishment'" of petitioner's Presbyterian faith or of any other religion (*Sherbert v. Verner*, 374 U.S. at 409). On the contrary, statutes such as these increase the freedom of individuals to practice the faith of their own choosing. As such, they are fully in keeping with the spirit of the Free Exercise and Establishment Clauses. See *McDaniel v. Paty*, 435 U.S. 618, 635-639 (1978) (Brennan, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

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FEBRUARY 1986

AMICUS CURIAE

BRIEF

MOTION FILED

MAY 7 1984

No. 83-1158

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,
Petitioner
v.

CALDOR, INC.,
Respondent

On Writ of Certiorari
to the Supreme Court of Connecticut

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE COUNCIL OF STATE GOVERNMENTS,
THE NATIONAL ASSOCIATION OF COUNTIES
AND THE NATIONAL CONFERENCE OF
STATE LEGISLATURES
AS AMICI CURIAE IN SUPPORT OF THE PETITIONER**

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QUESTION PRESENTED

Whether the Establishment Clause is violated by a state law which prevents private employers from adopting practices that discriminate against employees who observe their Sabbath.

IN THE
Supreme Court of the United States
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Respondent

On Writ of Certiorari
to the Supreme Court of Connecticut

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Council of State Governments, the National Association of Counties, and the National Conference of State Legislatures respectfully move this Court, pursuant to Rule 36, for leave to file the accompanying brief *amicus curiae* in support of the petition.*

The *amici* are organizations that represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal questions affecting such governments. This case presents

* Petitioner, Estate of Donald E. Thornton, and intervenor, State of Connecticut, have consented to the filing of this brief. Respondent, Caldor, Inc., has not, and it is therefore necessary to request leave to file.

an issue of great importance concerning the authority of these governments to enact measures which effectively eradicate discrimination.

States have legislatively proscribed many forms of invidious discrimination for over a century, long before the federal government's power to do so was firmly established by this Court. The state proscriptions include bars against religious discrimination in employment: many state and local governments have laws which, like the statute held unconstitutional below, assure equal employment opportunity for all citizens regardless of their religious practices. Because such a law has been struck down in this case, *amici* seek permission to submit this brief to assist the Court in considering the issues raised by this litigation, issues which have broad implications for the power of state and local governments to proscribe religious discrimination.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON,
Petitioner
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 CALDOR, INC.,
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On Writ of Certiorari
 to the Supreme Court of Connecticut

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
 THE NATIONAL ASSOCIATION OF COUNTIES
 AND THE NATIONAL CONFERENCE OF
 STATE LEGISLATURES
 AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICI

The interest of the amici is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE¹

A. Relevant Facts

Donald E. Thornton began working as a department manager for respondent, Caldor, Inc., the operator of a chain of retail department stores in Connecticut, in 1975 (App. 3a-4a). At that time, in compliance with Connect-

¹ References to the Appendix filed with the petition for a writ of certiorari shall be noted as App. —.

icut's Sunday closing laws, Caldor's stores were not open for business on Sunday. In 1976, the state legislature modified the closing laws. As a result, more businesses were permitted to open on Sunday. The new legislation also included the employee protection provision whose validity is at issue in this case, Conn. Gen. Stat. § 53-303e. It provides that no employer may require an employee engaged in a commercial occupation to work more than six days a week. It also provides that no employer can require an employee to work on the latter's Sabbath, and that an employee's refusal to work on his Sabbath shall not be grounds for dismissal. *Id.* at § 53-303e(b).

Subsequently, in 1977, Caldor began operating its Connecticut stores on Sundays. Caldor required department managers like Thornton to work one Sunday out of four. In November of 1979, Thornton, a devout Presbyterian, informed Caldor that he could not continue to work on Sunday because that day was his Sabbath. Caldor suggested that he transfer to a supervisory job in Massachusetts, where he would not be required to work on Sunday, but he rejected the suggestion because of the distance and hardship involved in commuting, or moving, to Massachusetts. Over Thornton's objection, Caldor then demoted him to a non-supervisory position at his regular location. In that position, Thornton was not required to work on Sunday, but was forced to suffer a decrease in pay of almost 50 percent, from \$6.46 to \$3.50 per hour. Because the reduction in pay was unacceptable, Thornton resigned (App. 3a).

B. Decisions Below

Shortly after resigning, Thornton appealed Caldor's action to the Connecticut state board of mediation and arbitration, alleging wrongful discharge under General Statutes § 53-303e(b) (App. 3a). The board of mediation determined that Thornton had been "discharged" in violation of § 53-303e(b) and it issued an award in his

favor (*id.* at 4a).² Caldor filed an application with the trial court to vacate the arbitration award, and Thornton filed a cross-application to confirm it (*ibid.*). The trial court confirmed the award (App. 19a-23a). It concluded that the board was correct in finding that Caldor's actions violated § 53-303e(b). Applying a three-part test which was first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court rejected Caldor's contention that the statutory provision violates the Establishment Clause of the First Amendment. The court upheld the statute's constitutionality because it found that the provision reflects a clearly secular legislative purpose, that its primary effect is not to advance religion, and that it does not foster an excessive government entanglement with religion (*id.* at 20a-22a).

The Connecticut Supreme Court affirmed the holding that, in demoting Thornton for refusing to work on his Sabbath, Caldor had violated § 53-303e(b) (App. 7a). Nonetheless, the court directed that the arbitration award be set aside, ruling that the employee protection provision violates the Establishment Clause under the three-part test. The court recognized that the statute, which mandates that no employee may be compelled to work more than six days per week, does not favor one religion over another or provide direct aid to any religious institution (*id.* at 15a). Nonetheless, the court held that the statute lacks a secular purpose, and that its effect is to advance religion, because it allows workers who observe the Sabbath to designate it as their day off, whereas employees who do not observe a Sabbath cannot designate their day off (*ibid.*)

² The board declined to address Caldor's contention that the statute was unconstitutional under the Establishment Clause of the First Amendment, viewing its authority as only "quasi-judicial" and not extending to the determination of the constitutionality of § 53-303e(b).

Finally, because the state board of mediation and arbitration may be required to decide whether an employee is sincere when he designates a day off as his Sabbath, the Connecticut Supreme Court held that the statute's enforcement mechanism will foster excessive government entanglement with religion (App. 15a-16a).

SUMMARY OF THE ARGUMENT

A. State governments historically possess the power to proscribe numerous forms of discrimination. Since the latter part of the nineteenth century, states have exercised this power by enacting laws which bar private discrimination based on invidious factors such as race, sex, national origin, and religion. These laws barring discrimination give greater efficacy to constitutional rights by preventing private interferences with those rights.

Many states, pursuing their right to prohibit discrimination, have specifically banned private religious discrimination in employment. Like Connecticut, these states have enacted laws that bar work rules which compel employees to choose between their livelihoods and observance of their religion. The federal government has also enacted such a law, Section 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (& Supp. V) § 2000e(j).

This case involves the constitutionality of such state and federal laws. It is amici's submission that these laws are constitutional because they are enacted pursuant to governmental power to bar discrimination, are a reasonable response to changing social and economic conditions, implement principles enshrined in the Religion Clauses of the First Amendment, and are consistent with this Court's decisions under those clauses.

B. Over the past decade Sunday closing laws, which historically insured that employees would have at least one day of rest from work each week, have increasingly

been eliminated. Their elimination stems in large part from pressure by businesses seeking to serve their own financial interests and from pressure by elements of the public seeking the convenience of Sunday shopping. The result of their abrogation is a loss of protection for employees: Because more businesses are permitted to remain open seven days a week, more employees are faced with the prospect of being compelled to work every day of the week, and more workers face the Hobson's choice of either forsaking their religious beliefs by working on their Sabbath or losing their jobs.

The Connecticut statute is a rational and sensible response to the competing interests involved in or affected by the elimination of Sunday closing laws. The statute allows employers to seek financial gain by voluntarily keeping their businesses open all week, while it insures that employees will not be forced to work every day of the week or be foreclosed from practicing their religious beliefs.

The law is a reasonable and constitutional manifestation of "the power in the states . . . to remould through experimentation our economic practices and institutions to meet changing social and economic needs." *New State Ice Company v. Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting). If the statute were not constitutional, an employer's right to seek profit would be exalted over the employee's right to observe his religion.

C. The statute is also constitutional because it furthers the same objectives as the Religion Clauses. The object of the Religion Clauses is to preserve freedom of conscience and foster religious pluralism. The statute accomplishes these objectives by barring discriminatory work rules that would thwart the ability of individuals to exercise their religion. It does so without coercing or burdening religious practice or belief and without involving the state in religious affairs.

A statute which carries out the purposes of the Religion Clauses in this way is legal. States have the power to bar invidious discrimination based on factors which are irrelevant to full participation in American society. The Constitution explicitly makes religion irrelevant to such participation. The Connecticut law furthers this motif by barring religious discrimination that precludes full participation in the workplace. If the state was unable to statutorily ensure such full participation and was required to ignore discriminatory work rules, it would be constrained to display a callous indifference to religion. Such indifference was not intended by the Establishment Clause and is at war with the values which underlie the Free Exercise Clause.

D. This Court's decisions upholding laws and regulations that accommodate religion demonstrate that states have the power to proscribe work rules that discriminate against religious practice.

In its recent decision in *Lynch v. Donnelly*, No. 82-1256, O.T. 1983, decided March 5, 1984, this Court reaffirmed that accommodations of religion are valid and "follo[w] the best of our traditions." Slip op. at 8. The dissenters in *Lynch* agreed that certain accommodations are permissible. *Id.* at 21.

In many of this Court's decisions, accommodations of religion have been upheld against Establishment Clause challenges. In fact the tradition of accommodation is so strong that at times the Court has held that government must accommodate religious practice in order to satisfy the Free Exercise Clause.

Accommodations have been upheld because they do not infringe anyone's religious liberties but merely foster the exercise of freedom of religion in accordance with the purposes of the Religion Clauses. The same is true of the Connecticut statute at issue in this case. It infringes no

person's religious liberty but merely enables individuals to have a meaningful opportunity to observe their Sabbath if they voluntarily choose to do so. If such a law is illegal, government would be forced to manifest the "callous indifference" to religion eschewed by the Religion Clauses.

E. The lower court was unmindful of the fact that the Connecticut statute fosters the values enshrined in the Religion Clauses and is consistent with this Court's decisions under the Establishment Clause. It held the statute unconstitutional by erroneously regarding the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as the sole touchstone of constitutionality, and by committing error in its assessment of the statute's constitutionality under that test.

In *Lynch*, the Court explained that in determining whether a law affecting religion is constitutional, the fundamental inquiry is "whether, in reality, it establishes a religion or religious faith, or tends to do so." The Court stated that "no fixed per se rule can be framed," and that the three-part test is no more than a potentially helpful aid which is not employed when it is not relevant or useful. Slip op. at 8-9.

The test should not be employed here. The Connecticut statute coerces no religious belief or practice, burdens none, and establishes none. Instead, the statute furthers freedom of conscience. Under the fundamental inquiry of "whether in reality [a law] establishes religion" the Connecticut statute is constitutional. Recourse to a three-part test is unnecessary.

But even if the three-part test were applied as an aid to assessing the statute's constitutionality, the law would pass muster. In fact, every state and federal court to have examined similar provisions under the test has upheld them.

First, the statute has legitimate secular purposes and effects. It is a rational accommodation of competing interests, does not advance or endorse religion, and does not give sponsorship or financial support to religion. It merely permits a person to exercise voluntary choice regarding religious observance and prevents discrimination in the workplace.

Further, the statute does not create excessive government entanglement with religion. For there is no continuing and comprehensive government surveillance of religious institutions or doctrine, no contact with church authorities, and no regulation of religion.

The lower court, however, claimed that entanglement exists because inquiry into the sincerity of an employee's belief might be required when adjudicating a claim of unlawful discharge. The claim is incorrect under this Court's decisions. Similar inquiries have been required to determine conscientious objector status under the draft laws, to determine the tax exempt status of religious institutions, and to adjudicate entitlement to unemployment compensation. In none of these instances has inquiry into the sincerity of beliefs been found to create excessive entanglement, and there likewise is none here.

ARGUMENT

I. The Statute Is a Rational Exercise of the State's Power to Proscribe Private Acts of Discrimination

A. States Historically Possess and Have Exercised the Power to Bar Private Acts of Discrimination, Including Religious Discrimination

Under long established principles, the state and federal governments have the authority to eliminate numerous forms of discrimination. Thus, state governments have enacted laws to eradicate private discrimination against individuals since the latter part of the nineteenth century. These laws ban discrimination based on invidious factors such as race, sex, national origin, and religion.

This Court voiced approval of state anti-discrimination laws as early as 1876 when it declared:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there.

United States v. Cruikshank, 92 U.S. 542, 555 (1876). Seven years later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court reaffirmed that the states have the power to prevent private acts of racial discrimination, though at that time the Federal government lacked such power.³

When state or federal governments bar invidious private discrimination they give efficacy to constitutional rights by preventing private interferences with those rights. Laws achieving this result have been upheld by

³ The federal government's power to prevent private discrimination was not firmly established until the mid-twentieth century. See *United States v. Guest*, 383 U.S. 745 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

this Court. See e.g., *United States v. Guest*, 383 U.S. 745 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

In pursuit of their right to prohibit discrimination, states have specifically banned private religious discrimination in employment. Thus, like Connecticut, many state legislatures have enacted laws barring work rules that compel employees to choose between their livelihoods and observance of their religious beliefs.⁴

The federal government, too, has acted against private religious discrimination in employment. Congress has enacted a statute that prohibits such discrimination by requiring employers to reasonably accommodate the religious practices of their employees. Section 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (& Supp. V) § 2000e(j).⁵

This case involves the constitutionality of such state and federal laws. It is amici's submission that these salutary laws are constitutional because they are enacted pursuant to governmental power to bar discrimination, are a reasonable response to changing social and economic conditions, implement oft-reiterated principles enshrined in the Religion Clauses of the First Amendment, and are consistent with this Court's decisions under those Clauses.

⁴ E.g., Alaska Stat. § 18.80.220(b); Ariz. Rev. Stat. Ann. § 41-1461(6); Ky. Rev. Stat. 344.030(5); Mass. Gen. Laws Ann. Ch. 151B, § 4(1A); N.H. Rev. Stat. Ann. § 354-A:3(4) (incorporating federal law); N.Y. Exec. Law § 296(10); Pa. Rev. Stat. Ann. tit. 43, § 955.1 (public employees); S.C. Code Ann. § 1-13-30(k); Va. Code Ann. §§ 40.1-28.01 to 40.1-28.3; W.Va. Code Ann. § 61-10-25 to 61-10-27.

⁵ Title VII of the Civil Rights Act proscribes discrimination by an employer or labor organization because of religion. Section 703(j) defines religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship in the conduct of an employer's business."

B. The Statute is a Reasonable Response to Conflicting Societal Interests

In prior decades most states had Sunday closing laws. See *McGowan v. Maryland*, 366 U.S. 420, 435 (1961). These laws insured that all employees would have at least one day of rest from work each week. In recent years there has been an extensive and often successful movement to eliminate these laws. Business enterprises which seek to serve their own financial interests by remaining open seven days a week have sought change in the laws through legislative and judicial action. Elements of the public have also pressed for elimination of the laws because Sunday shopping can be more convenient for the vastly increased number of households in which both adults must work or in which there is only one adult.

As Sunday closing laws have increasingly been abrogated, ever more employees with religious convictions have been confronted with a Hobson's choice. Either they must forsake their religious beliefs by working on their Sabbath, or they must face the loss of their jobs.

The State of Connecticut has implemented a rational and equitable response to the problem presented by the desire for Sunday shopping, the continuing need to assure employees of one day of rest from work each week, and the needs of employees who wish to observe their Sabbaths. The State modified its Sunday closing law but simultaneously provided that an employer cannot require an employee to work more than six days a week, and must allow the employee to choose his Sabbath as his day off from work if he so desires.⁶

The statute is a sensible method of accommodating important competing interests. It allows the employer to

⁶ The legislative history of § 53-303e indicates that it was originally part of an act to repeal the closing laws entirely. See Substitute H.B. 5067, 1976 Connecticut Legislative Session, § 1. When the effort at total repeal was unsuccessful, § 53-303e was enacted as part of a modification of the laws.

seek financial gain by voluntarily keeping his business open all week, while it insures that the employee will not be dragooned into working every day of the week or be foreclosed from practicing his religion. Such a law is constitutional because it is a reasonable manifestation of the "power in the states . . . to remould through experimentation our economic practices and institutions to meet changing social and economic needs." *New State Ice Company v. Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting). See also *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980). Moreover, the provisions protecting an employee's right to voluntarily observe his Sabbath must be constitutional or the employer's right to seek profit would be exalted over the employee's right to observe his religion.⁷

II. The Statute Does Not Violate the Establishment Clause

A. Introduction

Both the Free Exercise and Establishment Clauses of the First Amendment were designed to foster religious pluralism and to preserve individual freedom of conscience in religious matters. The Framers of the Constitution intended that, together, the Clauses would prevent the kind of religious persecution and discrimination many settlers had fled Europe to escape. *Everson v. Board of Education*, 330 U.S. 1, 8-16 (1947). In pursuit of those objectives, the Free Exercise Clause proscribes governmental action that coerces religious practice or unduly burdens it. The Establishment Clause guarantees that individuals will be free from state sponsored religion and from the involvement of the sovereign in religious affairs.

⁷ The Constitution does not require that all be rendered unto Mammon.

The state statute at issue in this case furthers these objectives. It aids freedom of conscience and fosters religious pluralism by barring discriminatory work rules that thwart the ability of individuals to exercise their religion. The statute does not coerce any religious practice or belief, and it burdens none. It manifests no state involvement in the affairs of religion. It merely states that all employees must have one day off from work each week, and that an employee can select his Sabbath as his day off if he wishes.*

A statute which carries out the purposes of the Religion Clauses by preventing private discrimination against workers who observe their religion is inherently constitutional. As discussed above, it has been long established that states have the power to stop discrimination based on race, sex, and other factors which should be irrelevant to full participation in American society. The Constitution explicitly makes religion irrelevant to such participation by guaranteeing free exercise of religious beliefs and freedom from an established religion. The Connecticut law barring discrimination furthers this motif by insuring that religious observance will not disable one from full participation in the workplace.

If the state was unable to statutorily ensure such full participation, but instead had to ignore discriminatory work rules that harm the observant, it would be forced to display a "'callous indifference'" to religion that "was never intended by the Establishment Clause." Such in-

* Section 53-308e has none of the characteristics of laws which "establish" religion. It does not unconstitutionally render financial aid to religious institutions. E.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 849 (1975). Nor does it confer a governmental power on a religious institution. See *Larkin v. Grindel's Den*, 459 U.S. 116 (1983). Finally, it does not place government sponsorship behind religious doctrine. E.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980).

difference "would bring us into 'war with our national traditions as embodied in the First Amendment's guarantee of the free exercise of religion'." See *Lynch v. Donnelly*, No. 82-1256, O.T. 1983, decided March 5, 1984, slip op. at 4, quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) and *McCollum v. Board of Education*, 333 U.S. 203, 211-212 (1948).

B. This Court's Decisions Demonstrate that Government Can Require Employers to Accommodate their Employees' Religious Beliefs

The state's power to prevent discrimination against religious practice is supported by this Court's many decisions upholding laws and regulations that accommodate religion.

Recently, this Court reaffirmed that accommodations of religion are valid. In *Lynch v. Donnelly*, *supra*, the Court stated that the Constitution "affirmatively mandates accommodation" of religion, and that our history is pervaded by "evidence of accommodation of all faiths and all forms of religious expression." Slip op. at 4, 8. "Through this accommodation," the Court continued, "government action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" *Id.* at 8, quoting *Zorach v. Clauson*, *supra*, 343 U.S. at 314.

The dissenters in *Lynch v. Donnelly* agreed that appropriate accommodations of religion are permissible. They said, per Justice Brennan, that government "may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion." Slip op. at 21. On this basis they indicated approval of laws which accommodate religious practice by releasing children from public schools for religious instruction or by establishing Christmas as a public holiday. *Id.* at 21-22.

The Court's prior cases have upheld a variety of governmental accommodations of religion against Establish-

ment Clause challenges. The Court has said that states may allow Sabbatharians to keep their stores open on Sunday in contravention of otherwise applicable closing laws. *Brownfield v. Brown*, 366 U.S. 599, 608 (1961). It has held that states may provide released time from public schools for religious instruction. *Zorach v. Clauson*, 343 U.S. 301 (1952). It has ruled that the federal government may exempt religious objectors from the draft. *Gillette v. United States*, 401 U.S. 437 (1971). It has upheld tax exemptions on church property and tax credits for parents of parochial school children. *Walz v. Tax Commission*, 397 U.S. 654 (1970); *Mueller v. Allen*, ---- U.S. ----, 103 S.Ct. 3062 (1983).⁶

Indeed, the tradition of accommodating religious practice is so strong that at times the Court has held that government must do so in order to satisfy the Free Exercise Clause. Thus, the Court has ruled that states must exempt Sabbatharians from provisions in unemployment compensation laws that could compel them to accept jobs requiring work on their Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963). It has also held that Jehovah's Witnesses must be exempted from provisions in the unemployment compensation laws that could require them to work in the war munitions industry in violation of their religious beliefs. *Thomas v. Review Board*, 450 U.S. 707 (1981). Similarly, the Court has held that states must exempt Amish children from compulsory school attendance laws in order to allow the Amish to freely exercise their religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The foregoing decisions establish that benign accommodations of religious practice do not infringe anyone's religious liberties, but merely foster the exercise of freedom

⁶ See also, *Arlene Department Store, Inc. v. Kentucky*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatharians).

of religion in accordance with the purposes of the Religion Clauses. This is the situation that obtains under the Connecticut statute. The statute does not infringe the religious liberty or belief of any person, be he employer or employee: all remain free to believe and practice as they will, and none suffers the slightest religious coercion. Rather than infringing anyone's religion, the statute merely enables an individual to have a meaningful opportunity to observe his Sabbath if he voluntarily chooses to do so. It is lawful for government to enable individuals to thusly practice their religion if they desire. If governmental action of this type were not lawful, government would be forced to manifest the "callous indifference" toward religion "that was never intended by the Establishment Clause."¹⁸

C. The Statute Does Not Establish Religion and Is Valid Under The *Lemon* Three-Part Test

Though the Connecticut statute fosters the values enshrined in the Religion Clauses and comports with numerous decisions of this Court, the lower court ruled that

¹⁸ In other areas, such as racial discrimination, government has secured constitutional rights by protecting them against private action as well as governmental action. See *United States v. Guest*, *supra*, 383 U.S. at 782-784 (Brennan, J., concurring in part and dissenting in part). Government can do the same in the area of religious discrimination. Thus, Justice Marshall, joined by Justice Brennan, has concluded that it is "beyond dispute" that an employer can be required to exempt religious observers from work rules in order to facilitate exercise of their religious beliefs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 91 (1977) (Marshall J., dissenting). Citing *Brownfield, Sherbert* and their progeny, Justice Marshall observed that if a state does not establish religion by excusing religious practitioners from obligations owed the state, it is difficult to see how it does so "by requiring employers to do the same with respect to obligations owed the employer". *Id.* at 90-91.

Justice Marshall's position is correct. Since religion is not "established" when government itself accommodates religious practices, it is no more "established" when government simply requires that others too should accommodate them.

the statute violates the Establishment Clause. The court reached this result by applying the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); the court regarded that test as the sole touchstone of constitutionality. The lower court held that the statute fails under the three-part test because the law allows workers who observe the Sabbath to designate it as their day off, whereas workers who do not observe a Sabbath cannot designate their day off.

The court committed error both in utilizing the three-part test as the polestar of constitutionality and in its assessment of the situation under that test. In *Lynch v. Donnelly* this Court made clear that, in determining whether a law affecting religion is constitutional, the fundamental inquiry is "whether, in reality, it establishes a religion or religious faith, or tends to do so." Slip op. at 8-9. "In each case", said the Court, "the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Id.* at 9. The Court pointed out that the three-part test is no more than a potentially helpful aid in the inquiry, and need not be, and was not, applied in cases where it was not "relevant" or "useful". *Ibid.*, citing *Marsh v. Chambers*, — U.S. —, 103 S.Ct. 3330 (1983) and *Larson v. Valente*, 456 U.S. 228 (1982).

Under the fundamental inquiry of "whether, in reality, a law establishes religion," the Connecticut statute is constitutional for reasons set forth above. The statute endures no religious belief or practice, burdens none, and establishes none. It merely fosters freedom of conscience by enabling an employee to voluntarily observe the Sabbath if he so chooses. This is dispositive against claims of unconstitutionality, without need for recourse to the three-part test.

But even if the three-part test were to be applied as "a helpful signpost" in assessing the statute's constitutionality, see *Mueller v. Allen*, *supra*, 103 S.Ct. at 3066, the law would still pass muster. (That, indeed, has been

the ruling of every state and federal court, except the one below, which has considered the legality of provisions like the one at issue here.)¹¹

Under the three-part test, a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion. 403 U.S. at 612-613. Furthermore, the Court will not strike down a law for lack of secular purpose unless "there [is] no question that the statute . . . was motivated wholly by religious considerations." *Lynch v. Donnelly*, *supra*, slip op. at 10.¹² The Connecticut statute is lawful under these criteria.

First, the law has legitimate secular purposes and effects. For Connecticut's statute is a rational accommodation

¹¹ The federal courts of appeal have ruled the religious accommodation requirement of Title VII of the Civil Rights Act of 1964 is constitutional under the three-part test. *McDaniel v. Eason International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Tonley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1982); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1048 (1981); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 33 (8th Cir. 1975), *rev'd. on other grounds*, 432 U.S. 68 (1977); *Cummins v. Parker Seal Co.*, 516 F.2d 544 (8th Cir. 1975), vacated and remanded on other grounds, 433 U.S. 903 (1977).

State supreme courts, applying the three-part test, have upheld identical state religious accommodation requirements. *Kentucky Commission on Human Rights v. Kervin Bakery, Inc.*, 644 S.W.2d 330 (Ky. Ct. App. 1982), cert. denied, 103 S.Ct. 3115 (1983); *Baskins v. Commission on Professional Competency*, 24 Cal. 3d 167 (1979), appeal dismissed, 444 U.S. 988 (1980).

¹² In *Lynch* the Court pointed out that a single secular purpose is sufficient to uphold a law, and that a statute need not have "'exclusively secular'" objectives. It added that, "were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." Slip op. at 11, n. 6.

of competing interests, including the desire of businesses to make profits by remaining open seven days a week, the desire of individuals to shop on Sunday, the need to ensure that persons have one day free from work each week, and the need to ensure that discriminatory work rules do not foreclose an individual from practicing his religion if he so desires. Moreover, the provision regarding an employee who observes his Sabbath does not endorse or advance religion. Rather, it merely allows a person to exercise voluntary choice regarding religious observance, and prevents discrimination in the work place by banning rules which, though purportedly neutral, in fact have discriminatory impact on religious practitioners. Finally, the law in no way involves "sponsorship, financial support, and active involvement of the sovereign in religious activity;" thus, it in no way involves characteristics manifesting an impermissibly religious motivation and effect. See *Waltz v. Tax Commission*, *supra*, 397 U.S. at 668.

Second, there is no excessive entanglement with religion. Such entanglement exists where there is "comprehensive, discriminating, and continuing state surveillance" of religious institutions or doctrine. See *Lynch*, slip op. at 14; *Lemon v. Kurtzman*, *supra*, 403 U.S. at 619. Nothing like that exists here. Indeed here, as in *Lynch*, slip op. at 14, there is "no evidence of contact with church authorities," nor is there any regulation whatsoever of religion.

The Connecticut Supreme Court, however, claimed there was excessive entanglement because the state board of mediation and arbitration might inquire into the sincerity of an employee's religious belief when adjudicating a claim of unlawful discharge under the statute. The lower court's conclusion is incorrect under this Court's decisions. In numerous of the Court's cases it has been necessary for official bodies to make similar inquiries in determining whether a person or institution meets statu-

tory criteria which accommodate religion, yet this has not created excessive entanglement and has not caused a statute to be unconstitutional. Inquiries into religious belief are necessary in determining whether a draftee meets the statutory criteria for conscientious objector status, *Gillette v. United States*, *supra*, whether an institution claiming to be a church meets the statutory criteria for the tax exemptions allowed to religious institutions, *Waltz v. Tax Commission*, *supra*, and whether a person left a job for religious reasons and therefore is entitled to unemployment compensation, *Sherbert and Thomas*, *supra*. In none of these cases did the need for inquiry into the sincerity of religious belief create excessive government entanglement with religion. The same result obtains in this case. For the inquiry here is no different, and no more entangling, than the inquiry required in prior cases. And, as shown by those cases, inquiry into the sincerity of belief, in order to determine whether statutory criteria are met, is simply not the kind of "comprehensive, discriminating, and continuing state surveillance" of religion that is precluded by the Establishment Clause.

CONCLUSION

For the foregoing reasons, the decision of the Connecticut Supreme Court should be reversed.

Respectfully submitted,

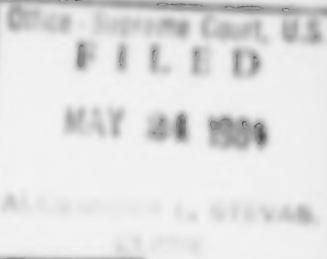
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BRIEF



No. 83-1158

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,

Petitioner.

v.

CALDOR, INC.,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Connecticut

**MOTION FOR LEAVE TO FILE AND BRIEF FOR
THE NATIONAL RIGHT TO WORK LEGAL DEFENSE
FOUNDATION AS *AMICUS CURIAE* FOR PETITIONER**

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae in support of the petitioner, and would show:

I. Interest of Amicus Curiae

The National Right to Work Legal Defense Foundation is a nonprofit charitable organization formed to provide free legal aid to individual employees who suffer from an abuse of compulsory unionism. As part of this program, the Foundation is presently extending litigation assistance to employees who find that compulsory support of labor unions is in conflict

with their sincerely held religious beliefs. These cases are litigated under various state and federal statutes which prohibit discrimination on the basis of religious belief and practice.

II. Purpose of This Brief

The National Right to Work Legal Defense Foundation has in the past presented to this Court the point of view of individual employees whose rights under the First Amendment to the Constitution of the United States clash headlong with the collective power granted to groups of employees under comprehensive state and federal labor relations laws. See, e.g. *Ellis v. BRAC*, ____ U.S. ____, 52 U.S.L.W. 4499 (April 25, 1984); *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). In those cases this Court held that certain individual rights were properly invaded because of the legislature's determination that collective power promotes labor peace.

State and Federal labor relations laws have resulted in the comprehensive regulation of the workplace. These statutes, among other things, delegate to unions the authority to enter into contractual agreements which bind all employees (regardless of individual choice) into a collective system. Since this comprehensive regulation of the workplace results in a substantial intrusion upon individual freedom, this brief argues that a legislature may pass additional legislation to restore some measure of individual liberty without violating the Establishment Clause of the First Amendment.

The religious freedom cases supported by the National

Right to Work Legal Defense Foundation arise only where an exclusive bargaining representative is present. The petitioner in this case, Mr. Thornton, was not within a bargaining unit represented by an exclusive agent. This brief presents to the Court an argument in support of the Connecticut statute (and analogous Federal statutes) which presents the point of view of the numerous employees who find these types of statutes necessary to protect them from the contract entered into by their employer and exclusive bargaining agent.

It is believed that the parties to this case will not present an argument to this Court from this point of view.

Nathan Lewin, on behalf of the petitioner, consented to the filing of this brief. Joseph I. Lieberman, on behalf of the intervenor, State of Connecticut, consented to the filing of this brief. Eliot B. Gershen, on behalf of the respondent, neither consented nor objected to this brief. Respondent states that it did not believe it appropriate to select those to whom consent should be granted or withheld, and, as a result, left the decision to the discretion of this Court. This necessitates the filing of this motion.

For these reasons, the National Right to Work Legal Defense Foundation requests that this motion be granted and the annexed brief be accepted for filing.

Respectfully submitted,



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BRIEF FOR THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

I. Interest of Amicus Curiae

The interest of the amicus curiae is contained in the motion for leave to file this brief and adopted herein.

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment prohibits the state from sponsoring, supporting or actively involving itself in religious activity. Fifty years ago this might have prohibited the passage of legislation which

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affirmatively protected an employee from being required to work on his Sabbath.

Today, the state has extensively regulated the workplace. Individual rights have been largely replaced by state endorsed collective mechanisms. These collective rights have smothered individual idiosyncratic religious practice. They have substantially impaired the ability of employees holding unusual religious beliefs to work out an individual accommodation with their employer. To protect the individual, the state is permitted, and in fact may be required, to pass legislation to protect the individual's right to freely practice his religion. The state may cut a hole for individual liberty in the hedge of comprehensive regulation without offending the Establishment Clause.

ARGUMENT

A. State And Federal Governments Have So Pervasively Regulated The Field Of Labor Relations That Statutes Affirmatively Protecting Religious Belief And Practice Simply Implement The Constitutional Guarantee Of The Free Exercise Of Religion And Do Not Establish Religion.

When John Locke announced in 1689 "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other," he embarked upon a task that was a great deal more simple

¹ Locke, A Letter Concerning Toleration, in 25 Great Books of the Western World (Hutchinson ed. 1952), 2.

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than it is today. Today, the "business of civil government" extends to nearly every facet of the individual's life. In particular, the state has seen fit to make an employer's work its business.

Labor unions have been granted unprecedented authority by the state over employees in the field of labor relations. These groups of employees not only hold the traditional power to speak on their own behalf with their employer regarding their terms and conditions of employment, they have been granted the power to compel other employees to be represented, against their will, by them in matters that are of utmost importance to the individual employee. See, *International Association of Machinists v. Street*, 367 U.S. 740, 791 (1961) (Black, dissenting). The exclusive bargaining representative has been granted the power to prevent the individual employee from engaging on his own in meaningful discussion with his employer regarding his working conditions. 29 U.S.C. § 158(a)(5); 29 U.S.C. § 159(a). The employee may not strike his own "deal" with his employer if it is inconsistent with the collective agreement. 29 U.S.C. § 159(a). What is more, the employer and union have been granted the power to require the employee to pay for representation even though it is undesired and unwanted. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956).

This Court, and its members, have recognized that this grant of governmental power, in both the public and private sectors has created a significant infringement upon First Amendment rights. See, *Ellis v. Railway Clerks*, ____ U.S. ___, 52 U.S.L.W. 4499, 4504 (April 25, 1984); *Minnesota*

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Board For Community Colleges v. Knights, ____ U.S. ____; 104 S. Ct. 1058, 1073 n.2 (Brennan, dissenting, academic context), 104 S. Ct. at 1081 (Sweezy, dissenting) (1984); *Ahoud v. Detroit Board of Education*, 431 U.S. 209, 222 (1977).

Although the delegation and exercise of this authority runs counter to the First Amendment rights of free speech, association and free exercise of religion, see e.g., *Worley v. Maynard*, 430 U.S. 705, 714-715 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), it is permitted because of the legislative assessment that labor peace is enhanced by this scheme of collective, rather than individual rights. *Ellis*, 52 U.S.L.W. at 4504; see *Ahoud*, 222, 223.

In the absence of this comprehensive state regulation an employee would be free to individually work out with his employer (if in fact he could) a mutually acceptable agreement which would allow him to satisfy the requirements of his religious beliefs. But the hand of the government, with its extensive regulation, has changed the picture. As a result, the two most commonly litigated religious freedom problems in the workplace are compulsory union fees and Sabbath work.¹ The problem of compulsory union fees can

¹ Union fees. See, e.g. *Rosenblum v. Smith Steel Workers*, 643 F.2d 449 (7th Cir. 1981); *Tucker v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981, cert. denied, 454 U.S. 1098 (1982)); *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *McDaniel v. Board of Education*, Inc., 571 F.2d 378 (10th Cir. 1978); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). Sabbath work. See, e.g. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Steel Co. v. Commonw.*, 438 U.S. 61 (1978) (per curiam, aff'd by an equally divided Court); *Dewey v. Reynolds Metal Co.*, 462 U.S. 689 (1979) (per curiam, aff'd by an equally divided Court); *Pharm. v. Local 83, C.I.A.W.*, 559 F.2d 477 (9th Cir. 1977).

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be traced directly to the legislative scheme which authorizes an exclusive bargaining representative and authorizes compulsory payments to that agent.²

The problem of Sabbath work has been exacerbated by collective agreements setting out inflexible seniority systems which provide for work assignments based upon longevity rather than the quality of employee need. In fact, this Court has held that as a matter of statutory interpretation, an employer's right to secure an accommodation of his religious beliefs under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) is diminished when an employer and union have collectively agreed upon a seniority system. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-83 (1977).

What Congress or the state legislature has done, it can undo. When the framers of the First Amendment wrote the Free Exercise and Establishment Clauses the "business of civil government" did not extend to the workplace in the way it does now. The state did not smother individual religious idiosyncrasy with collective mechanisms. When the government has so hedged in individual liberty with comprehensive labor statutes, it may cut a "hole in the hedge" with yet another statute to restore its neutrality in religious matters.

This Court has recently held that the First Amendment affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility towards any.

² Congress, recognizing this problem, has added additional legislation to the National Labor Relations Act to prevent religious discrimination. 29 U.S.C. § 188.

Lynch v. Donnelly, ____ U.S. ____; 104 S. Ct. 1335, 1339 (1984). After so comprehensively regulating the workplace that an employee's right to practice his individual religious beliefs is smothered, a legislature may pass statutes which affirmatively accommodate religious belief.

Perhaps the clearest example of this legislative hedge cutting occurred in *Zorach v. Clauson*, 343 U.S. 356 (1952). There, the state had comprehensively legislated in the area of child education through the establishment of the school system, compulsory attendance laws, and the compulsory funding of the public school system. As part of this comprehensive regulation the City of New York released the children at a certain time of the day to receive religious education. This Court held that this "released time" program did not violate the establishment clause. *Zorach*, at 315.

With this comprehensive regulation of education the city had hedged in the educational experience of the public school children. The majority opinion intimated that if the city had not engaged in "hedge cutting", through the released time program, that it might have violated the free exercise clause. This Court said:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religion.

gious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach, at 313-314.

The similarities between the released time program in *Zorach* and Connecticut statute in *Thornton* are striking. The government has heavily regulated labor relations. These regulations have made it much more difficult for Sabbatharians to practice their religious beliefs.¹ To allow religious believers in general, or Sabbatharians in particular to practice their beliefs, Connecticut cut a hole in the hedge of comprehensive labor regulation to allow them to have their day of rest regardless of what would be allowed were the collective to decide.²

The Connecticut Sabbath statute is like a "released time" provision for employees. The majority opinion in *Zorach* said the government could "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." *Zorach*, at 314. If the government can close its doors to permit religious worship, then certainly it can pass legislation which permits individual

¹ While Calder's employees were covered by extensive labor regulations, as mentioned before, Thornton's religious beliefs were not limited by the collective agreement. He was outside the bargaining unit. If inside, he would have his Sabbath off, but would have to accept the unit's lower wage scale. This specific fact should not alter this Court's analysis of the Constitutional issues — an analysis which has broad application. The cases cited in footnote 2, *supra*, show the conflict between individual belief and collective power is a common and difficult problem.

² The work scheduling of the employer and the relevant clauses in the collective bargaining agreement will reflect the religious beliefs and practices of the majority.

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employees, to "repair" for "religious worship or instruction".

Quite candidly, this Court in *Zorach* and subsequent establishment cases has not clearly articulated this concept of "hedge cutting" where the state has highly regulated the freedom of the individual. Perhaps this is because it has only been within the last fifty years that the state has started to pervasively regulate in the workplace and other "non-traditional" areas. Given the activism of the state, and the concurrent touch upon individual freedom, the Establishment Clause must be viewed in a new way.

Although not clearly articulated before, the "hedge cutting" argument set forth in this brief is consistent with the prior decisions of this Court even though this was not the clearly articulated basis for the decision.⁶

For example, the government has pervasively regulated in the area of taxation of private property. This taxation could very well stifle the free exercise of religion by churches and church members if the operations of their church were taxed. As a result, Congress cut a hole in the hedge of this pervasive regulation and exempted church property from taxation. This release from taxation does not violate the Establishment Clause. *Walz v. Tax Commission*, 397 U.S. 664, 691, 692 (1970) (Brennan, J., concurring).

⁶ This brief does not explicitly address the *Lemon v. Kurtzman*, 403 U.S. 622 (1971) three part test because it is assumed that this test will be exhaustively argued in the briefs of the parties. As a practical matter, this brief addresses the second test, that the principal effect of the statute neither advances or inhibits religion. By cutting a "hole in the hedge" the state makes sure that religion is not inhibited.

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The government pervasively involved itself in the lives of young men through the conscription laws. These laws requiring young men to leave home and family and engage in combat in some cases interfered with their religious belief and practice. To avoid this clash, Congress enacted section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. § 456(j)) which provided a release for conscientious objectors. This Court held this exemption did not violate the Establishment Clause, in part, because it was a permissible attempt to accommodate free exercise values. *Gillette v. U.S.*, 401 U.S. 437, 453 (1971). Having hedged in a young man's activities through conscription, Congress was permitted to cut a hole in the hedge to allow him to practice his religious beliefs.

In Justice Brennan's concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203, 296-299 (1963) he elaborated on several specific situations in which the legislature may involve itself in religious matters in order to preserve the right of free exercise of religion. When the government has ordered an individual into a penal institution or the military, it extensively regulates the individual's life. Justice Brennan appears to argue that when the state has so hedged in an individual, that it may "cut a hole" for religious freedom by providing chapels and chaplains.

These examples demonstrate the wide latitude possessed by the state in restoring the individual freedom it has previously taken away. In the workplace the right of the religious believer to refrain from supporting private, secular organizations is eliminated by statutes permitting union shop agreements. The ability of the religious believer to

work out an individual agreement with his employer regarding his Sabbath is greatly hindered by the mechanism of exclusive representation. Were this Court to strike down the Connecticut statute in question, and therefore cast a Constitutional shadow upon all other laws affirmatively prohibiting religious discrimination, these employees' individual religious rights would be extinguished by the power of the collective.

CONCLUSION

Consistent with past decisions, this Court may hold that in areas where the government has intruded upon individual freedom by extensive regulation, it may affirmatively protect individual religious liberty by passing a statute, which cuts a hole for individual liberty in the hedge of regulation, without offending the Establishment Clause of the First Amendment to the United States Constitution.

Respectfully submitted,



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AMICUS CURIAE

BRIEF

MOTION FILED

No. 85-1198

MAY 30 1984

In The
Supreme Court of the United States
October Term, 1983

ESTATE OF DONALD E. THORNTON,

Petitioner,

v.

CALICO INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF CONNECTICUT

**MOTION FOR LEAVE TO FILE AND BRIEF
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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BEST AVAILABLE COPY

In the
Supreme Court of the United States

No. 63-1158

STATE OF DONALD E. THORNTON,

Petitioner.

vs.

CALICO, INC.,

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF CONNECTICUT**

MOTION FOR LEAVE TO FILE BRIEF

AMICUS CURIAE

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position of petitioner requesting that this Court reverse the decision below which held that Section 53-30b of the Connecticut General Statutes is unconstitutional.

Consent to file the proffered brief has been sought from the parties. Petitioner has consented to the filing of this brief and the letter indicating this is attached as an appendix to this motion and brief. Respondent has stated that it is their general policy not to consent to or oppose the filing of *amicus curiae* briefs. It is, therefore, necessary to request permission of this Court under Rule 42.

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our

democracy are best served through the separation of church and state and the right to free exercise of religion.

The Anti-Defamation League believes that accommodation of the religious beliefs of all citizens is essential to preserving the principles upon which this nation was founded and is consistent with the outcome of the religious clause of the First Amendment.

In support of the separation of church and state and the right to free exercise of religion, the Anti-Defamation League has previously filed amicus briefs before this Court in numerous cases regarding accommodation of the religious beliefs of employees. *E.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cannon*, 429 U.S. 63 (1978), certified and remanded, 433 U.S. 903 (1977); *Brewer v. Reynolds Metal Co.*, 402 U.S. 68 (1971); *Sherrill v. Reiter*, 274 U.S. 988 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedom. It respectfully offers the Court its accumulated experience with the issues raised by this case.

Respectfully submitted,

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QUESTION PRESENTED

Is a state statute which grants all employees one day off from work each week and specifies that religious observers of all denominations can take their Sabbath as that day off an unconstitutional establishment of religion?

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IN THE
Supreme Court of the United States

No. 63-1158

STATE OF DONALD E. THOMAS,

Petitioner,

v.

CALDOR, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF CONNECTICUT

BRIEF AMICUS CURIAE OF THE
ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH

The Anti-Defamation League of B'nai B'rith submits this brief in support of the petitioner and respectfully submits that the judgment of the Supreme Court of the State of Connecticut should be reversed.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In its pursuit of these goals, the Anti-Defamation League has assisted numerous Sabbath observers of various denominations in remaining gainfully employed while still following the tenets of

their religion. We believe that legislative attempts to reasonably accommodate the religious beliefs of all citizens are in accord with the principles of religious freedom upon which this nation was founded and are consistent with the strictures of the religion clauses of the First Amendment.

STATEMENT OF THE CASE

In 1975, petitioner, Donald Thornton, began working for respondent, Caldor, Inc., a retail department store with branches throughout New England. At that time, because of the operation of a Sunday Closing Law, Connecticut General Statute §§ 53-300 to 53-303 (1975 ed.), Caldor's Connecticut stores were closed on Sunday. In 1976, the Sunday Closing Laws were revised to permit certain businesses to open on Sundays. The new law provided that no employee would be required to work more than six days in any calendar week. § 53-303e(a). The revised law also provided:

No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal. § 53-303e(b).

1. The statute in its entirety reads:

Conn. Gen. Stat. Section 53-303e

MORE THAN SIX DAYS EMPLOYMENT IN CALENDAR WEEK PROHIBITED. EMPLOYEE OBSERVANCE OF SABBATH. EMPLOYEE REMEDIES.

(a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.

(b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the

Footnote continued on next page

The constitutionality of this latter provision is at issue in this case.

Pursuant to the revised law, in 1977 Caldor opened its Connecticut stores for business on Sunday and required that its department managers, including Donald Thornton, be available to work one out of every four Sundays. In November, 1979, petitioner requested of Caldor that he be excused from work on Sundays as that was his Sabbath. Caldor refused to honor this request. Instead, they offered to transfer him to a Massachusetts store where he would not be required to work on Sundays, or to demote him to a non-supervisory capacity at his present location. While this latter alternative did not involve Sunday work, the salary was substantially below that which he was then earning.

Thornton rejected both alternatives and submitted his resignation. He filed a grievance with the state board of mediation which sustained the grievance and ordered Thornton reinstated with back pay. The board, however, declined to address the constitutionality of the statute.

Caldor filed a petition in the Hartford - New Britain Superior Court to vacate the award of the board of mediation. Thornton cross-moved to confirm the award. The trial court again ruled for Thornton, upholding the constitutionality of the statute against an Establishment Clause challenge. In so doing, the court relied on *McGowan v. Maryland*, 366 U.S. 420 (1961), to support the right of the state to provide for a day of rest. "[T]he statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice." Petition for Certiorari, Appendix B at 22a (hereinafter "Pet. App. B").

The Connecticut Supreme Court reversed, holding that the statute violated the tripartite test traditionally utilized to analyze cases under the Establishment Clause. Petition for Certiorari,

employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

(e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

Appendix A (hereinafter "Pet. App. A"). First, the court held that the statute did not have a secular purpose, but rather its purpose was "to allow those persons who wish to worship on a particular day the freedom to do so." *Id.* at 14a. Second, the court held that the statute "conferred its 'benefit' on an explicitly religious basis," making its effect one of advancing religion. *Id.* at 15a. Finally, the statute was held to excessively entangle government with religion. The court based this on subsection (c) of § 53-303a, which empowered the state board of mediation and arbitration to resolve disputes between employers and employees arising under this section, thereby requiring "an analysis of the particular religious practices and . . . a decision concerning the scope of religious activities which may fairly be labelled 'observance of Sabbath.'" *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

It is well established that a statute will not pass constitutional muster under the Establishment Clause unless it has a clearly secular legislative purpose, its primary effect neither advances nor inhibits religion, and it does not excessively entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The Connecticut Supreme Court held that the statute challenged herein failed each prong of the tripartite test. Amicus submits that the court below misapplied the three-pronged test to the facts of the instant case.

The statute at issue requires that employees in the State of Connecticut not be forced to work more than six days a week, and that they be permitted to choose their Sabbath for their day of rest. An examination of the legislative history clearly indicates that, through this statute, the drafters intended to achieve the secular intent of the Blue Laws by giving all citizens a day of rest each week, whether or not that day be devoted to observing the Sabbath. In addition, it is urged that the immediate and obvious effect of Section 53-303a is not to advance religion, but to limit the number of days per week which an employee may be

compelled to work and, in so doing, to protect the religious freedom of Sabbath observers. Finally, while the challenged statute may minimally entangle government with religion, it is asserted that a mere inquiry into the sincerity of a Sabbath observer's beliefs does not lead to the type of excessive entanglement which is prohibited by the Establishment Clause.

Even assuming that the statute in question burdens the Establishment Clause, the State of Connecticut in enacting this legislation had a legitimate interest in protecting the free exercise rights of its citizens. That is because Conn. Gen. Stat. § 53-303a represents a permissible accommodation between the two religious clauses of the First Amendment in a manner by which government neither advocates nor handicaps religion. By its terms, all employees are precluded from working more than six days in a row. Religious observers of all denominations are simply permitted to choose which day that seventh day may be, so that they can observe their respective Sabbaths. This avoids putting the religiously observant to the thorny choice between following the tenets of their religion and being gainfully employed. Such a choice is an impermissible burden on rights guaranteed by the Free Exercise Clause. The State of Connecticut avoided this burden by conferring a benefit on all its employees which also recognized the rights of the religiously observant. This is the consonance of values which the Free Exercise and Establishment Clauses require.

ARGUMENT

POINT ONE

THE CONNECTICUT STATUTE WHICH PROTECTS RELIGIOUS OBSERVERS AGAINST BEING COMPELLED TO WORK ON THE DAY OF THE WEEK THEY OBSERVE AS THEIR SABBATH DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Establishment Clause was designed to ensure governmental neutrality in matters of religion. *Gilligan v. United States*, 401

U.S. 637, 649 (1971). Government neutrality, however, has not been so narrowly defined that the "highest devotion from an exclusively straight course leads to accommodation." *Skefert v. Stover*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting). This Court recently reiterated its view that total separation between church and state is not only impossible, but that "[t]he relationship between government and religious organizations is inevitable." *Lynch v. Donnelly*, ____ U.S. ____; 104 S. Ct. 1355, 1358 (1984), citing *Everson v. Boardman*, 330 U.S. 497, 514 (1971). While the government must avoid hostility to one group, "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions." *Lynch*, 104 S. Ct. at 1359. Efforts at accommodation which permit citizens to enjoy their religious beliefs are not necessarily violations of the constitutional establishment standard. Through accommodation, the government has "follow[ed] the best of our traditions" and "respect[ed] the religious tenets of our people." *Zorach v. Cromartie*, 343 U.S. 316, 318 (1952).

In order to pass constitutional muster, the challenged law or conduct must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion; and it must not excessively entangle government with religion. *Everson*, 330 U.S. at 512-513.

In the decision below, the Connecticut Supreme Court held that the statute challenged herein failed each prong of the tricorner test. As shall be demonstrated hereafter, we submit that the Connecticut Supreme Court misapplied the three-pronged test to the facts of the instant case.

4. The Statute Has A Secular Purpose.

In holding that Connecticut's General Statutes § 53-30b(e)(b) violates the first prong of the tricorner test, the court before cited (citing the use of the term Sabbath in the law, "especially where, as here, the term is capitalized," comes with "religious strings attached and is not 'devoid of religious overtones.'") Pct. App. A at 12a - 13a. The court opined that the commonly accepted meaning

of the Sabbath is "a time of rest and worship." Id. at 12a. Using this as a basis, the Connecticut Supreme Court found that because the "irreconcilable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so," the statute fails the secular purpose test of the Establishment Clause. Id. at 14a. As will be demonstrated below, the Connecticut Supreme Court misapplied the purpose prong of the tricorner test.

In 1976, the Connecticut legislature successfully attempted to repeal the Sunday Blue Laws which had been on the books in the state since 1653. Much of the eighty-two pages of debate in the Connecticut House and Senate regarding this issue centered around the importance of maintaining a day of rest and relaxation for working people. Although the Blue Laws were originally intended to be religious in nature, the legislators repeatedly recognized that over the years this intent had come instead to mean a common day of rest and leisure for the people of Connecticut to spend with their families. See 19 Conn. S. Proc. Pt. 3, 1976 Sess. 2013 - 2014; 19 Conn. H. Proc. Pt. 6, 1976 Sess. 2409 - 2410; 19 Conn. H. Proc. Pt. 8, 1976 Sess. 3481 - 3491. While the movement to totally repeal the Blue Laws was ultimately rejected, compromise legislation was enacted which increased the list of days that could be sold and stores which could remain open on Sunday. As part of this compromise, the statute which is being challenged herein was enacted. Connecticut State Legislature, *Journal of the Senate*, April 28, 1976, 613-617.

Section 53-30b(e) was clearly drafted to address concerns which had been expressed about employees who would be required to staff the stores that would remain open on Sundays. Senator Cavarrosa, who favored total repeal of the Blue Laws, pointed out that this amendment "protects the working man" because "[a]n employee can be discharged for refusing to work seven days a week or on his Sabbath day." 19 Conn. S. Proc. Pt. 3 at 2021. In the House debate, Representative Weber stressed that the amendment not only protects an employer from "discouraging" any employee who is unwilling to work on his regular weekly day

of religious grouping." But that "the Bill also provides more than one day's work in any calendar week." (9 Conn. H. Proc. Pl. & A. 2415.) Surely, the legislators had ample opportunity to indicate that the inclusion of a day of rest in the congressional legislation was religiously motivated, had they so intended. Indeed, by their remarks it is clear that through the statute they intended to enhance the secular nature of the Blue Laws by giving all citizens a day of rest each week, whether or not that day be devoted to observing the Sabbath.

This Court has repeatedly rejected constitutional challenges to certain states' Sunday Blue Laws, noting that, over the years, the laws in question had evolved from their religious origin and intent and had come instead to mean a uniform day of rest and recreation. *Collegiate v. Chase Kroc Super Market of Minnesota, Inc.*, 366 U.S. 617 (1961); *Brownfield v. Brown*, 366 U.S. 589 (1961); *Ten Days from Christmas-Township, Inc. v. McConaughay*, 366 U.S. 582 (1961); *McComas v. Maryland*, 366 U.S. 439 (1961). The Sunday Closing Laws have the effect of compelling all employers to shut down on six, if not all, operations on Sunday, whether or not it is inimical to the financial interests of certain classes of people who are members of the towns of those establishto close their businesses on another day. In reality, however, these laws accommodate the religious needs of the majority Christian community.

By contrast, the Connecticut statute permits all employers, if they so choose, to keep their business open seven days a week. The statute merely requires that employers not be forced to work more than six days, and that they be permitted to choose their Sabbath for their day of rest. The statute not only addresses the needs of Sabbath observers, but also guarantees a day of rest and recreation to non-religious employees. Surely, if a law requiring employers to close on Sunday, the traditional Sabbath for the religion of the majority, is not an establishment of religion, a law requiring a floating day of rest should also be permitted. Section 13-B(2)(a)(b) merely relieves individuals of the burden of choosing between their jobs and their religious convictions. This secular

purpose is a well established part of our tradition of "avoiding unnecessary clashes with the dictates of conscience." *Nottelsoe v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), cert. denied, 454 U.S. 1046 (1981), quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting).

Concededly, the Connecticut statute may resolve certain problems confronting sectarians. This alone, however, is insufficient to show that the statute lacks a secular purpose. While statutes have been invalidated where a secular purpose was lacking, it has only been after the Court found there was no "clearly secular legislative purpose." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772-773 (1973). Recently, however, this Court modified the test, holding that a statute will be struck down only when the Court has "concluded that there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 104 S. Ct. at 1362 (emphasis added). See e.g., *Stone v. Graham*, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981) (law requiring posting of Ten Commandments on public classroom walls); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (law banning teaching of evolution in public schools); *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963) (law requiring Bible reading in public schools). Amicus respectfully urges this Court that the purpose test adopted in *Lynch* is unnecessarily lenient and should not be applied where, as here, the statute has a clear and compelling secular purpose and the benefit to religion is incidental. However, should the Court utilize the more lenient analysis, the statute challenged herein would, of course, be permissible.

For the foregoing reasons we submit that the Connecticut statute is sustained by a neutral purpose.

B. The Primary Effect Of The Statute Is Not To Advance Religion But To Limit The Number Of Days Per Week Which An Employee May Be Compelled To Work And Is So Doing To Protect The Religious Freedom Of Sabbath Observers.

The court below found that Section 53-303e(b) of Connecticut's General Statutes violated the second prong of the Establishment Clause test in that it conferred a "benefit" on an explicitly religious basis" because "[o]nly those employees who designate a Sabbath are entitled not to work on that particular day," and "[w]orkers who do not 'observe a Sabbath' may not avail themselves of the benefit. . . ." Pet. App. A at 15a. Amicus submits that the Connecticut Supreme Court's findings are clearly erroneous and based on inaccurate reasoning. It is urged that the immediate and obvious effect of Section 53-303e is not to advance religion, but to limit to six the number of days which any employee may be compelled to work in a given week, thereby "protect[ing] all persons from the physical and moral delacement which comes from uninterrupted labor." *McGowan*, 366 U.S. at 436, citing *Scout Hing v. Crowley*, 113 U.S. 703, 710 (1885). Surely the people of the State of Connecticut are entitled to one day out of seven where they are able to rest from the week's labors and spend time with their families. In fashioning a rule whereby each individual is free to choose which day that is according to the precepts of his or her religion, rather than mandating a universal day off for all employees, the legislators were merely accommodating the needs of their citizens.²

2. The constitutionality of federal accommodation legislation is not at issue, nor is it implicated by an analysis of the Connecticut statute. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, prohibits religious discrimination in employment and requires an employer to "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless such an accommodation will cause "undue hardship on the conduct of the employer's business." Section 701(j), 42 U.S.C. § 2000e(j).

The constitutionality of section 701(j) has been uniformly affirmed by the three courts of appeals which have considered the issue. *McDonald v. Evers International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Finsley v.*

Footnote continued on next page.

The trial court found that Section 53-303e was constitutional because the primary effect "is to limit the number of days which an employee may be compelled to work to six days per week." Pet. App. B at 21a. In relying on *McGowan*, 366 U.S. 420, to authorize such a law, the judge noted that it was permissible to provide for an individually selected day of rest rather than for one common day:

The statute avoids forcing all employees to conform to Sunday as a day of rest when their own religion may observe a different day as Sabbath. Thus, the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice. Pet. App. B at 22a.

Martin Marietta Corp., 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nuttallum*, 643 F.2d 443.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 61 (1977), this Court considered claims of employment discrimination under an Equal Employment Opportunity Commission guideline from which section 701(j) was derived, 29 C.F.R. § 1605.1 (1968). The Court cited the statutory amendment to Title VII which codified the EEOC guideline and stated that the "intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74.

Although section 701(j) protects a wide variety of religious beliefs and practices, it does so without affording preferential treatment to religion. In *Nuttallum*, the Seventh Circuit analogized section 701(j) to selective service statutes:

Like the statutory exemption to military service for conscientious objectors, it requires no particular sectarian affiliation or theological position and promotes only "the principle of supremacy of conscience." It does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer by permitting them to fulfill their societal obligations in a different manner. *Nuttallum*, 643 F.2d at 454 (citations and footnotes omitted).

Accommodation under section 701(j) "places the plaintiff on an equal footing with other employees whose religious convictions find no impediment in the work place. To this extent, the accommodation reflects government neutrality in the face of religious differences." *Finsley*, 648 F.2d at 1243.

It is only after stating in section (a) that an employee may be compelled to work more than six days a week, that the statute goes on to provide in section (b) that an employee may not be required to work on his Sabbath. We urge this Court that the inclusion of section (b) is not to advance religion, but to relieve the economic burden borne by a minority of Americans because of their faithful adherence to religions that do not conform to the majority's belief concerning which day of the week is the religiously mandated day of rest. The effect of the statute is to grant individuals the right to choose religious beliefs or non-beliefs free from a coercive environment. In so doing, the statute protects the jobs of the victims of intentional discrimination as well as those who are unintentionally discriminated against because their religious convictions are not reflected in the facially neutral majoritarian rules. *Nortelum*, 643 F.2d at 454.

In upholding the selective service exemption for conscientious objectors, this Court recognized the pragmatic consideration of the "helplessness of converting a sincere conscientious objector into an effective fighting man." *Gillette*, 401 U.S. at 452. Similarly, in fashioning the Connecticut statute the legislators recognized that, in practice, any attempt to force individuals to compromise their religious convictions would be futile. Like the conscientious objectors, employees in the State of Connecticut "should not be punished for the supremacy of conscience." *Commo v. Parker Seal Co.*, 516 F.2d 544, 555-553 (2nd Cir. 1975), *aff'd mem.* by equally divided Court, 429 U.S. 65 (1976), vacated and remanded, 433 U.S. 901 (1977).

Moreover, the challenged statute does not advance any one religion, but applies equally to Moslems, whose Sabbath is Friday, and Jews, whose Sabbath is Saturday, as it does to those men or individuals who may believe that any other day of the week is the divinely mandated day of rest. Indeed, the statute protects Sunday-observing Christians who may be employed by a Presbyterian in Connecticut, which no longer has a Sunday Closing Law, or who may be employed in an industry which traditionally remains open on Sunday. However, for the majority of

individuals who work in businesses which are closed on Sunday, either because of collective bargaining agreements, the owner's personal religious predilections, or similar reasons, the primary effect of the statute is not to advance any one religion, but to equalize or, more accurately, diminish to some extent the inequality between adherents of the majority religion and those of the minority faiths. Of course, of those relieved by the statute from working on their Sabbath, some may attend church or synagogue. This, we suggest, forms a shaky foundation upon which an Establishment Clause violation may rest.

In all of these situations and others that could be cited where a statute was upheld under the Establishment Clause, the statute did not benefit a narrow class, but was addressed to a class which, in one instance or another, encompassed a majority of Americans, a factor which is an important index of secular effect. *Murphy v. Allen*, ____ U.S. ____; 103 S. Ct. 3062, 3068 (1983).

To conclude that the primary effect of a statute which was designed to give all employees a day of rest and recreation, including Sabbath observers, is to advance religion in violation of the Establishment Clause would require a much narrower interpretation of what constitutes endorsement of or aid to religion than the Court has been willing to adopt in the past. Cf. *Lynch*, 104 S. Ct. 1355 (upholding the constitutionality of a municipally sponsored display of a nativity scene); *Boerner v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (nonsectarian grants to church-sponsored schools); *Everson v. Board of Education*, 330 U.S. 1, cert'd denied, 330 U.S. 855 (1947) (expenditure of public funds for transportation of students to church-sponsored schools).

Assuming, argendo, that the challenged statute advances religion to some degree, this Court has made it abundantly clear that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Nygard*, 413 U.S. at 771 (citations omitted). "A religious accommodation does not violate the Establishment Clause merely because it can be construed in some abstract way

as placing an inappropriate but inevitable burden on those not so-called." *Trosky*, at 1246. Exemptions for conscientious objectors have been upheld despite the effect of requiring non-objectors to serve in their place. *Gillies*, 401 U.S. 437.

The statute challenged herein does not come close to the level of unconstitutional aid to religion which was found to be unconstitutional in *Larkins v. Greider's Den*, ____ U.S. ____, 163 S. Ct. 505 (1982) (issuing veto authority had been vested in a church), or *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction had been made available in public school classrooms). In fact, employees who, by this statute, are guaranteed the right not to work on their Sabbath will not even be paid for their time off. Surely, to allow them to choose their day of rest according to the precepts of their religion is an incidental to the benefit conferred by the Sunday Closing Law which the Court upheld in *McGowan*, 366 U.S. 433.

C. The Challenged Statute Does Not Foster Excessive Entanglement Between Government and Religion.

In finding that Connecticut's statute violates the third prong of the Establishment Clause test, the court below looked to subsection (c) of § 53-30(b) which empowers the state board of education and arbitration to resolve disputes arising under subsection (b). The court found that "[i]nvariably, as employees challenge the sincerity of employees' Sabbath observance, the board's inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may fairly be labeled 'observance of Sabbath.'" *Pen. App. A* at 11a - 11a. Based upon this, the court held that "[t]he enforcement mechanism of subsection (c) is exactly the type of "compromising, discriminating and monitoring state surveillance" . . . which creates excessive governmental entanglement between church and state." *Id.* at 11a, citing *Jones*, 403 U.S. at 620. While it is conceded that the challenged statute may minimally involve government with religion, it is asserted that the statute cannot lead to the type of

excessive entanglement which is prohibited by the Establishment Clause.

Whatever a governmental body is required to pass on a religion-based claim, some entanglement with religion is unavoidable. If that small degree of entanglement is considered fatal, no law exempting religious institutions from taxation would be constitutional, all religious incorporation laws would be invalid, and all laws forbidding the sale of alcoholic beverages within specified distances of houses of worship would be unconstitutional, for in each case the governmental body mandated to enforce the law would be forbidden to determine whether the claimant is truly a house of worship. Conscientious objectors would be denied military exemptions because selective service boards would not be permitted to inquire whether their beliefs were sincerely held. Public school children could not be released for religious instruction since the school authorities would not be allowed to determine whether the instruction was truly religious. Military chaplains could be outlawed for the military authorities would be barred from passing judgment on whether the applicant was truly a chaplain and, if so, whether he was a competent one. Ministers could not be exempt from military or jury service. "Church Entrance - No Parking" signs would have to be removed. Innumerable other instances of legal determinations of claims based upon religion would have to be discontinued.

It is for these reasons that the third prong of the test prohibits only excessive government entanglement with religion. The challenged statute does not require any day-to-day interaction between religion and government, there is no governmental monitoring of an individual's religious beliefs, and the observant employees are not being paid for the day they take off on their Sabbath. In fact, the statute requires little or no contact between government and religion unless and until there is an inquiry into the sincerity of an employee's beliefs. Moreover, such as the one being challenged herein which seek to forbid discrimination in

employment because of religion, necessarily impose upon governmental agencies, whether judicial or administrative, the obligation to determine whether a claim asserted thereunder is valid, and a review of the claim for that purpose can hardly be held to entail forbidden excessive entanglement.

It is submitted that acceptance of the Connecticut Supreme Court's contention that a mere inquiry into the sincerity of Sabbath observers' beliefs excessively entangles the government with religion, emasculates the Free Exercise Clause. It is urged that adoption of such a principle would require this Court to accept any claim, no matter how frivolous, or reject all claims, no matter how sincere, raised thereunder. The issue of sincerity of religious beliefs is present in any case where one is exempted from a requirement because of religion. More than thirty years ago, this Court held in *United States v. Ballard*, 322 U.S. 78 (1944), that it is constitutional to allow a jury, in a prosecution for obtaining property under false pretenses which related to religion, to decide whether the defendants believed in the truth of the representations they made. The exemption in the Selective Service Laws for conscientious objectors, which requires an inquiry into the sincerity of claims being raised thereunder, has, likewise, been found constitutional. *Gillette*, 401 U.S. 437. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court upheld under the Free Exercise Clause the right of parents to allow their children not to attend secondary schools if they believed that such attendance would violate their religious conscience. Similarly, the Court upheld the constitutionality of a property tax exemption for religious organizations, despite the fact that a state might occasionally have to determine whether a group's religious beliefs were sincere. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

In all of these situations, as in the present case, acceptance of the constitutional claim depends upon a judgment as to the sincerity of the asserted religious belief, a minimal and heretofore acceptable involvement of government with religion.

POINT II

THE STATUTORY ACCOMMODATION ASSISTS IN PRESERVING THE NEUTRALITY MANDATED BY THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

No clearer command than the Biblical prohibition on Sabbath work could exist for the religiously observant. See Exodus 20:8-11. Yet, this absolute ban is all the Bible specifies; there is no mention of when the Sabbath is to be observed. Different religions throughout history have chosen to honor different days of the week as their Sabbath. Moslems, for example, observe the Sabbath on Friday, Jews and Seventh Day Adventists on Saturday, and Christians on Sunday. Whatever day one honors, the fundamental right to observe one's religious beliefs is protected by the religious liberty guarantees of the First Amendment's Free Exercise Clause. This same concern for safeguarding the religious liberty of its citizens led the Connecticut legislature to enact § 53-303e(b).

The right to the free exercise of religion guaranteed by the First Amendment is a right of the highest order. Barring evidence of a significant Establishment Clause concern, it can only be limited by a showing of an overriding governmental interest that cannot be accomplished by less restrictive means. *United States v. Lee*, ____ U.S. ___, 102 S. Ct 1051 (1982); *Yoder*, 406 U.S. 205.

Should this Court find, as *amicus* submits, that the statute in question is not at odds with the Establishment Clause, it need not consider the free exercise rights implicated herein. Assuming, *arguendo*, that the Establishment Clause is implicated, a balancing test must be utilized to determine whether free exercise rights should, nonetheless, prevail and whether the method of accommodation chosen is appropriate. *Walz*, 397 U.S. at 672. Where fundamental claims of religious freedom are at stake, as here, see *Yoder*, 406 U.S. at 221, and the state has no overriding interest, the free exercise rights should prevail. *Id.* The statute at issue in

this case is a constitutionally permissible means of accommodation that does not put employees to the thorny choice between following their religious beliefs and being gainfully employed.

In maintaining the balance between free exercise and establishment concerns, government must remain neutral. *Nyquist*, 413 U.S. 756, 788. Neutrality, however, does not mean hostility towards religion. *See Zorach*, 343 U.S. 306. Nor does it require government sponsorship or advancement of religion. It merely requires that the state "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 313-314. Where, however, as here, the state is not going beyond accommodating free exercise, but is using its power to confer a benefit on all employees in a manner which also protects the religious needs of certain employees, it has achieved the balance which the religion clauses of the First Amendment require. Moreover, the Connecticut legislature acted in a manner which was narrowly tailored to accommodate those needs. As discussed *supra* in Point I, Conn. Gen. Stat. § 53-303e is a general day of rest statute. In mandating that no employee be compelled to work more than six consecutive days, it provides all workers, non-religious as well as religious, with a day of rest. The only benefit to Sabbath observers is the right to select their day off in accordance with their religious beliefs. This arguable "benefit" is nothing more than a permissible resolution of the tension between the two religion clauses, without crossing the line of impermissible establishment by state action.

What Connecticut has done is consistent with what this Court held to be mandated by the Free Exercise Clause in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) and *Sherbert*, 374 U.S. 398. In those cases, this Court upheld under the Free Exercise Clause the rights of Sabbath observers to obtain unemployment compensation benefits when their inability to work was the result of adherence to religious beliefs. As Justice Brennan stated in *Sherbert*, "to condition

the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 407.

In both cases, this Court addressed the tension between the Establishment and Free Exercise Clauses and resolved the tension in favor of the latter. The Court reasoned that the state was not fostering religion, but rather permitting individuals to practice their religion and function in society without undue penalty. *Thomas*, 450 U.S. at 721; *Sherbert*, 374 U.S. at 409-10. Any benefit to religion that resulted from the granting of compensation to religious observers whose beliefs precluded their employment was incidental. This Court recognized that the challenged practice "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Thomas*, 450 U.S. at 720, *citing Sherbert*, 374 U.S. at 409.

A similar resolution of these issues was achieved in *Yoder*, 406 U.S. 205, where the free exercise right of the Amish to decline to send their children to high school in violation of state compulsory education laws was upheld. "[T]he danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise." *Id.* at 220-21.

In addition to the exemptions carved out by this Court in *Sherbert*, *Thomas* and *Yoder*, specific statutory accommodations on the basis of religion have also been upheld by this Court as appropriate resolutions of free exercise concerns.³ In *Zorach*, 343 U.S. 306, this Court upheld a New York statute and accompanying regulations which permitted public school students to leave the school building during the school day to receive religious

3. In *People v. Moody*, 61 Cal. 2d 216, 394 P.2d 813 (1964), the California Supreme Court created an exemption from laws prohibiting the use of peyote for members of an American Indian religion which required its use.

instruction at a religious center. Unlike the statute at issue here, where each employee, whether religious or not, is entitled to one day off from work a week, the released time program excused only religiously motivated students from the classroom while school was still in session. Despite this, Justice Douglas held that when the state adjusts "the schedule of public events to sectarian needs it follows the best of traditions." *Id.* at 313-14. See *Walz*, 397 U.S. 664, 669 (upholding the granting of a property tax exemption to houses of worship as the type of "benevolent neutrality" necessary to spare the exercise of religion from the burdens of taxation borne by private institutions).

Another statutory accommodation of religious beliefs is the conscientious objector provision of the Selective Service Laws upheld as constitutional in *Gillette*, 401 U.S. 437. By requiring that persons who object to all war on religious grounds not be put to the "hard choice between contravening religion and conscience or suffering penalties," Congress recognized and respected that "fundamental principles of . . . religious duty may sometimes override the demands of the secular state." *Id.* at 445.

Most directly on point, however, is the language of Chief Justice Warren in *McGowan*, 366 U.S. 420, and *Braunfeld*, 366 U.S. 599. In upholding the constitutionality of Sunday Closing Laws, he noted that a state's interest in securing a periodic respite from work for employees could, consistent with the First Amendment, be accomplished by providing, as did Connecticut, a floating day of rest. *McGowan*, 366 U.S. at 450. He concluded that, unlike a uniform day of rest, an exemption from work to comport with one's observance of the Sabbath "may well be the wiser solution to the problem." *Braunfeld*, 366 U.S. at 608.

Free exercise claims have been rejected by this Court where the conduct or actions allegedly protected thereby posed some substantial threat to public safety, peace or order. See e.g., *Lee*, 102 S. Ct. 1051, (requiring Amish employers of Amish workmen to contribute to the social security system as necessary to maintain the vitality of the system); *Prince v. Massachusetts*, 321 U.S. 158

(1944) (application of law prohibiting minors from selling merchandise in public places to a nine year-old who was distributing literature necessary to protect the health and well being of young children); *Reynolds v. United States*, 98 U.S. 145 (1879) (application of federal law prohibiting polygamy by Mormons necessary to preserve social order). Section 53-303e(b) protects the free exercise rights of Connecticut's employees with no such concomitant dangers. It poses no threat to the orderly operation of the state, nor does it unreasonably violate the state's neutrality in religious matters so as to raise establishment concerns. Rather, it insures that employees in both the public and private sector will be able to work without being unduly penalized for their religious beliefs.

Holding this statute unconstitutional would result in making the gainful employment of Sabbath observers contingent upon their violating their religious beliefs. Actual or constructive discharge from employment on the basis of Sabbath observance is no less an incursion on the Free Exercise Clause than was the denial of unemployment benefits to Sabbath observers in *Thomas*, 450 U.S. 707, and *Sherbert*, 374 U.S. 398. Unlike the exemption in *Zorach*, 343 U.S. 306, the statute challenged herein provides all employees, not merely religious observers, with a one day respite from work. Nor does the exemption reach the level of relief granted from the obligations of the military for those whose religious beliefs prohibit participation in war. See *Gillette*, 401 U.S. 437; *United States v. Seeger*, 380 U.S. 163 (1965). Section 53-303e(b) merely permits employees of the State of Connecticut to be gainfully employed in a manner that does not unnecessarily trammel upon their religious liberties.

Plaintiff in the instant case was presented with the Hobson's choice of following the precepts of his religion or earning a living. The two are not mutually exclusive, but rather, for a religious person, each makes the other possible. Section 53-303e(b) accomplishes this result. To be able to participate in society by earning one's daily bread and still have the opportunity to promote the values of one's religion by observing the Sabbath is

aching less than the Free Exercise Clause requires and the Establishment Clause permits.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgment of the Connecticut Supreme Court holding Connecticut General Statutes § 53-303e(b) unconstitutional should be reversed.

Respectfully submitted,

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APPENDIX



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May 17, 1984

Ms. Leslie Shedlin
Anti-Defamation League
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823 United Nations Plaza - 11th Floor
New York, New York 10017

Re: Thornton v. Caldor

Dear Leslie:

This will confirm our telephone conversation of this date wherein I consented, on behalf of petitioner, for the Anti-Defamation League of B'nai B'rith, to file an amicus curiae brief in support of petitioner's position with the United States Supreme Court.

Sincerely,

Dennis Rapps
Executive Director

DR:NHL

AMICUS CURIAE

BRIEF

MOTION FILED

JUN 1 - 1984

No. 83-1158

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON, *Petitioner*,

v.

CALDOR, INC., *Respondent*.

On Writ Of Certiorari To The
Supreme Court of Connecticut

**MOTION OF THE SEVENTH-DAY ADVENTIST
CHURCH FOR LEAVE TO FILE AMICUS
CURIAE BRIEF AND BRIEF OF THE
SEVENTH-DAY ADVENTIST CHURCH AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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On Writ Of Certiorari To The
Supreme Court of Connecticut

**MOTION OF THE SEVENTH-DAY ADVENTIST
CHURCH FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

The Seventh-day Adventist Church respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*. Counsel of Record for Petitioner and for the State of Connecticut as Intervenor have consented to the filing of the church's brief. Counsel for Respondent, however, declined to consent.

INTEREST OF APPLICANT

The Seventh-day Adventist Church is a worldwide religious denomination whose four million members follow the Biblical command that the Sabbath, the seventh day of the week, be set aside from secular work and other worldly endeavors.

The nineteenth of the Church's 27 Fundamental Beliefs states: "The beneficent Creator, after the six days of

Creation, rested on the seventh day and instituted the Sabbath for all people as a memorial of Creation. The fourth commandment of God's unchangeable law requires the observance of this seventh-day Sabbath as the day of rest, worship, and ministry in harmony with the teaching and practice of Jesus, the Lord of the Sabbath. The Sabbath is a day of delightful communion with God and one another. It is a symbol of our redemption in Christ, a sign of our sanctification, a token of our allegiance, and a foretaste of our eternal future in God's kingdom. The Sabbath is God's perpetual sign of His eternal covenant between Him and His people. Joyful observance of this holy time from evening to evening, sunset to sunset, is a celebration of God's creative and redemptive acts. (Genesis 2:1-3; Exodus 20:8-11; Luke 4:16; Isaiah 58:5, 6; 58:13, 14; Matthew 12:1-12; Exodus 31:13-17; Ezekiel 20:12, 20; Deuteronomy 5:12-15; Hebrews 4:1-11; Leviticus 23:32; Mark 1:32.)" *Seventh-day Adventist Church Manual* at 40-41 (1981).

Seventh-day Adventists view their day of rest as a time for worship, witness, and religiously centered family activities. They do not view it as a time to mow the lawn, shop for groceries, or paint the house. As the Church teaches, "The Sabbath hours belong to God, and are to be used for Him alone. Our own pleasure, our own words, our own business, our own thoughts, should find no place in the observance of the Lord's day (Isaiah 58:13). Let us gather round the family circle at sunset and welcome the holy Sabbath with prayer and song, and let us close the day with prayer and expressions of gratitude for His wondrous love. The Sabbath is a special day for worship in the home and in the church, a day of joy to ourselves and our children, a day in which to learn more of God through the Bible and the great lesson book of nature. It is a time to visit the sick and to work for the salvation of souls. The

ordinary affairs of the six working days should be laid aside. No unnecessary work should be performed. Secular reading or secular broadcasts should not occupy our time on God's holy day." *Seventh-day Adventist Church Manual* at 217-18 (1981).

Because of their Sabbatarian beliefs and practices, Seventh-day Adventists often encounter difficulties in the workplace. In one four-year period, the Department of Public Affairs and Religious Liberty of the General Conference of Seventh-day Adventists recorded more than 800 employment problems involving Sabbath observance in the United States, where more than 600,000 of its members reside. *Hearings Before the United States Equal Employment Opportunity Commission on Religious Accommodation* at 30 (1980). Subsequent to this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), in which this Court construed the religious accommodation provision of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j), the number of such problems "has ballooned." *Ibid.*

In addition to the concern the Seventh-day Adventist Church has for religious accommodation of its members in the workplace, the Church also is greatly concerned about the implications this Court's decision may have on the religious accommodation provisions of other federal and state laws. On the federal level, for example, this Court's decision may bring into question the constitutionality of such diverse religious exemption or accommodation provisions as the exemption for ministers in the Selective Service Act, 40 U.S.C. App. § 456(g), the exemption for employees who have religious objections to paying dues and fees to labor organizations, 29 U.S.C. § 169, and the exemption for self-employed individuals

who have religious objections to paying Social Security taxes, 26 U.S.C. § 1402(g), in addition to the religious accommodation provision of Title VII of the Civil Rights Act of 1964, *supra*.

Finally, the Seventh-day Adventist Church is concerned about the international implications of this Court's decision in this case. That decision, like a rock thrown into quiet water, may have ripple effects in other countries as their legal systems attempt to give meaning to their constitutional guarantees of free exercise of religion. What this Court says in *Estate of Thornton v. Caldor, Inc.*, eventually may have worldwide effects—positive or negative—for the religious liberties of millions of men and women who seek freedom to practice their varied religions. Specialized journals increasingly seek out American writers to explain American law on religious subjects. For instance, the French-language journal *Conscience et Liberte*, which is published in Switzerland and translated into German, Spanish, Portuguese, and Italian, circulates in many of the developing nations of Africa and the Americas. A recent issue of that journal featured religious liberty in the United States and included an article entitled "Le respect des pratiques religieuses des employes," ("Respect for religious practices of employees.") 26 *Conscience et Liberte* 86 (1983).

Because of the Seventh-day Adventist Church's great interest in protecting the First Amendment rights of its members and others who from sincere religious convictions cannot work on their chosen day of rest, the Church prays that this Court grant its motion for leave to file an *amicus curiae* brief supporting the Petitioner's position that the Connecticut religious accommodation law does

not violate the Establishment Clause of the First Amendment.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON, *Petitioner.*

v.

CALDOR, INC., *Respondent.*

On Writ Of Certiorari To The
Supreme Court of Connecticut

**BRIEF OF THE SEVENTH-DAY ADVENTIST
CHURCH AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The interest of the Seventh-day Adventist Church as *amicus curiae* has been detailed in the Church's Motion for Leave to File *Amicus Curiae* Brief, which is bound with this brief and which is hereby incorporated by reference.

ARGUMENT

Connecticut's statute prohibiting dismissal of employees who conscientiously cannot work on their day of worship does not violate the Establishment Clause of the First Amendment. The statute is a permissible accommodation of the Free Exercise Clause of the First Amendment.

As this Court has explained, the purpose of the Religion Clauses of the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or of the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). At the same time, this Court has noted that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), and has detailed the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355, 1359-61 (1984).

This Court also has held that in our complex society the relationship between church and state and religion and state, under the Establishment Clause, does not call for a "regime of total separation." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Instead, the Establishment Clause constructs a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, *supra*, 413 U.S. at 614.

This Court also has pointed out that the two Religion Clauses—the Establishment Clause and the Free Exercise Clause—"overlap and interact in many ways." *Gillette v. United States*, 401 U.S. 437, 449 (1971). In *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668-69 (1970), this Court noted that it "has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." In *Walz*, which involved an Establishment Clause challenge to a real-property tax

exemption for churches, this Court discussed exemptions as a way to combat hostility toward religion:

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against these dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.

Id. at 673.

This Court in *Walz* also rejected the notion that "absolute neutrality" must exist in church-state relationships. Speaking for the Court, the Chief Justice stated:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

In addition, this Court in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), made clear that exemptions solely on the basis of religion are not establishments of religion if they are designed to protect the free exercise of religion. Most recently, in *Lynch v. Donnelly*, *supra*, 104 S.Ct. at 1359, this Court indicated that the Constitution "affirmatively

mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

This case involves one of these overlaps and interactions between the Establishment Clause and the Free Exercise Clause. The state of Connecticut has attempted to protect the free exercise rights of its citizens by means of a statutory exemption, General Statutes § 53-300e, and that statute is being challenged on Establishment Clause grounds. For the following reasons the Seventh-day Adventist Church, as *amicus curiae*, believes the Connecticut statute in question does not violate the Establishment Clause, which under this Court's three-part Establishment clause test requires that a statute (1) have a secular purpose; (2) have a primary effect of neither advancing nor inhibiting religion; and (3) not excessively entangle government and religion. *Lemon v. Kurtzman*, *supra*, 403 U.S. at 614.

A. The Connecticut Statute Has Two Secular Purposes: (1) To Regulate The Working Conditions Of The State's Citizens And (2) To Protect The Free Exercise Of Religion.

Under the first part of this Court's three-part Establishment Clause test, the statute in question must have a secular purpose. As this Court pointed out in *Lynch v. Donnelly*, *supra*, 104 S.Ct. at 1362, "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. . . . Even where the benefits to religion were substantial. . . we saw a secular purpose and no conflict with the Establishment Clause." (Citations omitted.) (Emphasis added.)

As this Court put the question in the *Lynch v. Donnelly*, "The narrow question is whether there is a secular

purpose for Pawtucket's display of the creche." This Court in that case found two secular purposes of the nativity scene—the celebration and depiction of the origins of Christmas.

In the present case the narrow question should be whether there are secular purposes for Connecticut's enactment of a statute such as that in question. In this case there are two such purposes.

First, the Connecticut statute is a valid exercise of the state's police power to regulate the working conditions of its citizens. This Court has upheld the general constitutionality of federal labor statutes. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937). The state trial court in this case found a valid secular purpose: "It is beyond question that a state, in the exercise of its police power, may regulate the working conditions of its citizens." *Caldor, Inc. v. Thornton*, Petition for Writ of Certiorari at 20a-21a. To support that proposition, the trial court cited this Court's decision in *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885):

Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States.

Also see *McGowen v. Maryland*, 366 U.S. 420, 436 (1961). As this Court held in *McGowen*, *supra*, 366 U.S. at 442: "[T]he Establishment Clause does not ban federal or state regulation of conduct whose reason or effect

merely happens to coincide with the tenets of some or all religions."

The Supreme Court of Connecticut also found that the statute in question has a valid secular purpose. It held that the statute "adequately addresses the valid secular purpose, upheld in *McGowen*, of forbidding uninterrupted labor." *Caldor, Inc. v. Thornton*, 191 Conn. 336, 464 A.2d 785, Petition for Writ of Certiorari at 12a. Even though the state supreme court went on to find a prohibited purpose, the significant point is that it did find at least one secular purpose. As this Court held in *Lynch v. Donnelly*, *supra*, it will invalidate legislation only when that legislation is "motivated wholly by religious considerations." 104 S.Ct. at 1362. This statute is not motivated wholly by religious considerations. Thus this Court should uphold the constitutionality of the Connecticut statute.

The second secular purpose of the statute in question is to protect the free exercise of religion. That proposition may sound peculiar to some, but this Court in *Gillette v. United States*, *supra*, held that the religion-based conscientious objection exemption in the draft law was *overrular* in nature. In *Gillette* this Court noted that the religious exemption

serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, . . . but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the state has always maintained." [Quoting *United States v. MacIntosh*, 283 U.S. 606, 621 (1932) (Hughes, C.J., dissenting).]

Id. at 452-53.

This Court should likewise hold that the Connecticut statute in this case, which in effect recognizes the employee's duty to a "power higher than the state," also has the valid secular purpose of protecting the free exercise of religion.

Clearly the Connecticut statute, with two secular purposes, cannot be said to be *wholly* motivated by "religious considerations. *Lynch v. Donnelly*, *supra*, 104 S.Ct. at 1362. Thus it passes the first part of this Court's three-part Establishment Clause test.

B. The Primary Effect Of The Connecticut Statute Neither Advances Nor Inhibits Religion.

This Court in *Walz v. Tax Commission*, *supra*, 397 U.S. at 668, summarized the meaning of the Establishment Clause this way: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." In summarizing its view of the Establishment Clause, the Court in *Walz* said, "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." 397 U.S. at 670.

The statute in question in this case does not "establish" religion by sponsoring a particular religion or religions. It does not directly financially support religion. It does not directly involve government in a religious activity.

But there may be some *indirect* aid to religion as a result of the statute. Religiously observant employees

may contribute money to their churches. But such indirect aid to religion is a permissible accommodation. As this Court stated in *Lynch v. Donnelly, supra*, 104 S.Ct. at 1364, "The Court has made it abundantly clear, however, that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' " (Quoting *Committee for Public Education & Religious Liberty v. Nyquist, supra*, 413 U.S. at 771). Also see *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

Here, where the law protects the religious free exercise of members of all religious groups, whatever benefit to religion is clearly indirect, remote, and incidental—and permissible. To paraphrase this Court's decision in *Lynch v. Donnelly, supra*, 104 S.Ct. at 1364, Connecticut's religious accommodation is no more an advancement or endorsement of religion than the constitutionally established fundamental right to the free exercise of religion.

Thus the Connecticut statute passes the second part of this Court's Establishment Clause test.

C. The Connecticut Accommodation Statute Does Not Excessively Entangle Church And State.

As this Court noted in *Lynch v. Donnelly, supra*, 104 S.Ct. at 1364, determining whether a statute excessively entangles church and state involves "a question of kind and degree." A key word often overlooked in the "excessive entanglement" part of the Establishment Clause test is "excessive."

When a statute offers a religious exemption, anyone claiming the exemption should expect to present credentials sufficient to receive the exemption. When the exemption involves religious belief or practice, anyone

claiming the exemption should expect to have to present evidence of his religious beliefs. A seminary student or minister expecting a religious exemption from the draft should not be offended if he or she is asked to establish a religious basis for the exemption request. An employee with religious objections to paying union dues should expect to be asked about his or her religious beliefs. As this Court held in *United States v. Ballard*, 322 U.S. 78 (1944), government may test the sincerity, but not the veracity, of religious beliefs.

This case reveals no excessive administrative entanglement—or potentially excessive administrative entanglement—between church and state. Any entanglement apparently was limited to the requirement that the employee establish his sincere religious beliefs for not working on his chosen day of worship. Clearly this is not excessive entanglement—or potentially excessive entanglement—between church and state.

Thus the Connecticut statute passes the third and final part of this Court's Establishment Clause test.

SUMMARY OF ARGUMENT

The Connecticut statute in question passes this Court's three-part Establishment Clause test. In addition, the statute, which accommodates religious practices, is mandated by the Free Exercise Clause of the First Amendment. As this Court recently stated in *Lynch v. Donnelly, supra*, 104 S.Ct. at 1359, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." The Connecticut statute is just such an accommodation.

CONCLUSION

For the reasons stated above, this Court should hold that the State of Connecticut has not violated the Establishment Clause of the First Amendment with General Statutes § 53-303e, which provides that an employee may not be required to work on a day he considers his day of worship and that an employee's refusal to work on his Sabbath is not grounds for dismissal. Accordingly, this Court should reverse the judgment of the Supreme Court of Connecticut.

Respectfully submitted,

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June 1, 1984

AMICUS CURIAE

BRIEF

MOTION FILED
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No. 83-1158

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Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Connecticut

**BRIEF OF AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE AS AMICUS CURIAE
AND MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

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On Writ of Certiorari to the Supreme Court
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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Americans United for Separation of Church and State respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained, but Counsel for the Respondent have not consented to the filing of a Brief by Americans United for Separation of Church and State.

The applicant, Americans United for Separation of Church and State, has an interest in this case in that it is the only national interfaith organization dedicated exclusively to defending religious liberty and the constitutional principle of church-state separation. Americans United

for Separation of Church and State has been involved in most of the major cases reaching this Court concerning the application of the Establishment Clause of the First Amendment to the United States Constitution. Americans United was formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. This organization is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

This *Amicus Curiae* Brief takes the position that the Connecticut statute in question provides a legislative free exercise accommodation which is not violative of the Establishment Clause of the First Amendment to the United States Constitution. Because of Americans United's long-standing defense of establishment concerns, it believes that it is particularly qualified to address an issue, the decision of which can have substantial impact on religious accommodation and exemption provisions in a multitude of federal and state legislative provisions.

Respectfully submitted,

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**BRIEF OF AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE AS AMICUS CURIAE**

INTEREST OF AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United has a membership of some 40 thousand members of various religious beliefs and some of no religious belief in all states of the United States, including the State of Connecticut. Americans United is involved in

extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the Establishment Clause of the First Amendment to the United States Constitution, including such cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975).

Americans United is particularly interested in the issues raised in this case because although this organization is firmly committed to the preservation of the principles embodied in the Establishment Clause of the First Amendment and is generally perceived as being primarily concerned with that clause, it believes that the Establishment Clause must not be interpreted so as to do violence to the ultimate objective of the religion clauses, that being the preservation of religious liberty. The Brief of this *Amicus Curiae* will argue that the Establishment Clause of the First Amendment to the United States Constitution is not violated by the Connecticut statute which guarantees that an individual, if requested, must be excused from secular employment so that the individual may observe his Sabbath.

ARGUMENT

A STATE LAW WHICH REQUIRES AN EMPLOYMENT RELATED EXEMPTION OR ACCOMMODATION SPECIFICALLY FOR THE RELIGIOUS NEEDS OF ITS CITIZENS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Supreme Court of Connecticut determined that §53-303e of the Connecticut General Statutes "does not pass constitutional muster under the strictures of the Establishment Clause," at least in part, because the statute chooses to use the word "Sabbath" thus demonstrating that it had "religious overtones." *Calidor, Inc. v. Thornton*, 464 A.2d 785, 792 (Conn. 1983). The state supreme court further indicated that since the law had "the unmistakable purpose" of "allow[ing] those persons who wish to worship on a particular day the freedom to do so," it could not be said to have a "clear secular purpose." *Calidor, Inc. v. Thornton*, *id.* at 793. The Connecticut Supreme Court also concluded that the law conferred a benefit "on an explicitly religious basis" and therefore violated the "primary effect" prong of the three-part Establishment Clause test, *id.* at 794.

The Connecticut court further determined that there was excessive governmental entanglement between church and state due to the fact that "as employers challenge the sincerity of employees' Sabbath, the board's inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may fairly be labeled 'observance of Sabbath.'" *Ibid.* That court concluded, therefore, that the statute required a "comprehensive, discriminating, and continuing state surveillance" which creates excessive governmental entanglement. *Ibid.*

This case involves the question as to what extent the free exercise rights of individuals may be accommodated by legislative action. This Court has held that in certain instances the Free Exercise Clause mandates an accommodation for religious needs. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 902 (1972). The concept of government accommodation of religion, however, does not begin and end only with the question of whether the religion clauses of the First Amendment require an exemption. The state legislature may go further than is constitutionally required under the Free Exercise Clause in an attempt to accommodate the religious needs of its citizens. *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970).

Courts frequently have spoken about the value of religion and conscience to society which justifies granting exemptions. In *Gillette v. United States*, 401 U.S. 437, 453, 461 n. 23 (1971), this Court noted that although draft exemptions for conscientious objectors probably is not mandated by the Constitution, "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with, 'our happy tradition' of 'avoiding unnecessary clashes with the dictate of conscience.'" To the same effect is *Braunfeld v. Brown*, 366 U.S. 599 (1961), where this Court upheld the constitutional validity of Pennsylvania's Sunday closing law as applied to retail merchants whose religious beliefs preclude them from working on Saturdays. Although this Court divided over whether the Free Exercise Clause required the state to exempt Sabbatharians from the operation of the Sunday closing laws, no justice doubted that the Establishment Clause permitted a state to provide such an exemption voluntarily to ensure that Sabbatharians would not continue to suffer economically as a result of the law. Indeed, the plurality opin-

ion, recognizing that states had in fact taken that approach, observed that "this may well be the wiser solution of the problem." *Id.* at 608.

Today the most common form of religious accommodation is found in state and federal law requiring accommodation for employees. In 1964 Congress adopted Title VII of the Civil Rights Act of 1964 which attempted to root out discrimination in the private sector of employment.

At the same time that Congress made it unlawful for an employer to fail or refuse to hire, to discharge or to otherwise discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, or national origin, Congress also proscribed similar employment conduct on the basis of religion, 42 U.S.C. 2000e-2(a). In addition, Congress stated that it was an unlawful employment practice for a labor organization to discriminate against an individual because of his religion or to cause or attempt to cause an employer to discriminate against an individual in violation of the Civil Rights Act of 1964. 42 U.S.C. 2000e-2(c)(1) and (c)(2).

In 1967 the United States Equal Employment Opportunity Commission adopted guidelines on discrimination because of religion. These guidelines decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate the religious needs of his employees or prospective employees so long as it did not impose an undue hardship on him. *Guidelines on Discrimination Because of Religion*, 29 C.F.R. 1605.1, issued and effective July 10, 1967.

In 1972, after certain court decisions had cast doubt on the EEOC religious discrimination guidelines and the whole area of religious accommodation, Congress, in an

attempt to clarify its position relative to religious discrimination in the private sector, made clear by its 1972 amendment to Title VII that an accommodation must be made for an individual's religious observance, practice, and belief, if that could be done reasonably without undue hardship to the employer, 42 U.S.C. §2000e(j). This amendment to Title VII provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employer's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Most claims filed under the religious accommodation provision of Title VII involve employees objecting to Sabbath employment. See, e.g., *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975); *Kendall v. United Airlines, Inc.*, 494 F.Supp. 1380 (N.D. Ill. 1980); *Pedon v. White*, 465 F.Supp. 602 (S.D. Tex. 1979); *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1 (D. Ore. 1973). However, Title VII has also been applied to a number of other varied religious concerns.

A California case held that the U.S. Postal Service had discriminated against an individual who refused to distribute draft registration materials, *McGinnis v. U.S. Postal Service*, 512 F.Supp. 517 (N.D. Cal. 1980). The Third Circuit ruled that a Jehovah's Witness employed by a utility company was entitled to be accommodated for his personal religious beliefs which proscribe the raising and lowering of the flag, *Gavin v. Peoples Natural Gas*, 613 F.2d 482 (3rd Cir. 1980). The Seventh Circuit in *Minkus v.*

Metropolitan Sanitary Dist., 600 F.2d 80 (7th Cir. 1979), ruled that Title VII was violated when an Orthodox Jew was prohibited from taking a civil service exam which was scheduled only on his Sabbath. The Fifth Circuit in *Young v. Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir., 1975), held that the religious accommodation provision of Title VII protects an Atheist who was given a choice by her employer of attending a prayer meeting during work hours or being fired. A series of Title VII cases have also held that both employers or labor organizations must accommodate religious dissenters unable for religious reasons to financially support a labor organization, *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottebon v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1980), cert. denied, 454 U.S. 1046 (1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), cert. denied, 454 U.S. 1098 (1981).

This Court repeatedly has been asked to rule that the religious accommodation provision of Title VII violates the Establishment Clause. The Court to date has avoided such an invitation. *International Association of Machinists v. Anderson*, 454 U.S. 1145 (1982); *United Steel Workers, Local 8141 v. Tooley*, 454 U.S. 1098 (1981); *Smith Steel Workers v. Nottebon*, 45 U.S. 1046 (1981).

If this Court were to sustain the holding of the Connecticut Supreme Court, it would place in serious jeopardy the legislative protection which is now afforded to employees und'r Title VII and similar state laws. Sabbatharians can never achieve equality of employment opportunity so long as employers and unions are permitted to exclude from employment those who cannot, because of conscience, work on their Sabbath.

It should be recognized that the area of religious discrimination holds a somewhat unique position in the area of

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Title VII and similar state requirements. Discrimination on the basis of race, color, sex, or national origin usually affects a substantially large and identifiable class. Religious discrimination, on the other hand, generally involves a one-on-one situation, the one person in the plant who wants to be excused from work on Sunday or Saturday in order to observe his Sabbath.

Sabbatarians have long faced the "built-in headwinds" of employment policy that require employers, particularly new employees, to work on Friday night or Saturday. This practice operates to exclude Sabbatarians from employment. To a lesser degree, those who refrain from any secular work on Sunday have similar problems.

It is important for us to keep in mind that the problem today faced by Sabbatarians, in large part, has been created and complicated by the government itself as a result of labor legislation which permits a union to represent all employees within a bargaining unit as to the terms and conditions of employment.

The union thereupon becomes the exclusive bargaining agent in the negotiating of a labor agreement with the employer. The individual, at the same time, loses his right to bargain with the employer on his own and for himself. A company and union, by agreement, cast conditions of employment. Employees experiencing difficulties with reference to race and sex discrimination do not stand alone and usually can enlist the assistance of their collective bargaining representative to protect their interests. A lone Sabbatarian in a factory, however, often finds that neither the company nor the union has any interest in protecting his or her unique needs. Given the unequal bargaining power of the parties and the economic dependence of the employee, without the existence of legislation such as Title

VII or the Connecticut statute, an individual requiring an accommodation for his religious needs finds himself alone and looking for new employment. Under *Sherbert v. Verner*, *supra*, the unemployed Sabbath keeper is ensured welfare benefits, but the Connecticut statute guarantees that he will not be unemployed because of his religious beliefs. This legislation thus aids both the employer and the state.

The State of Connecticut has sought to provide protection for the Sabbath-keeping needs of an employee at the labor marketplace. This Court, in *Sherbert v. Verner*, *supra*, specifically held that religious accommodations are not necessarily establishments of religion if they are designed to protect the free exercise of religion.

Prior to the *Sherbert* decision, this Court, in *Everson v. Board of Education*, 330 U.S. 1 (1947), held that the Establishment Clause incorporates the principle of separation of church and state. It not only prohibits an established church and preferences among religions, but it seeks to isolate the affairs of government from matters religious in nature.

The following year, this Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1954), considered a case in which a parent-taxpayer brought suit to halt a program of "released time" for sectarian religious education conducted on the public school premises. The aid to religion in *McCollum* was not merely incidental to a secular purpose but was a direct encouragement to religion. *McCollum* was not a case where the state was merely seeking to protect the free exercise of religion. In effect the state threatened the free exercise of religion of those pupils not members of the major religious faiths. The nature of the plan was such that it involved subtle, indirect pressure to conform to prevailing religious beliefs.

Four years later in *Zorach v. Clausen*, 343 U.S. 306 (1952), the Court faced another type of program somewhat similar to McCollum. Under the "Summers time" plan, the public school facility accommodated the religious needs of the students by permitting the students to leave the facilities to attend religious instructional programs off the public school premises. In *Zorach* the Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation was permitted by this Court in order to maintain a neutrality between believers in religion and nonbelievers.

The Connecticut Supreme Court, while recognizing that S.S.-Title(b) does not favor one religion over another, and does not provide direct aid to religious institutions in the form of money or property, nevertheless held that "it confers its 'benefits' on an explicitly religious basis." *Calder, Inc. v. Thornton*, *supra* at 794. It is, however, difficult to see how the Connecticut statute conferred any greater benefit on Mr. Thornton than this Court in *Sherbert* validated when requiring that unemployment compensation be paid to Mrs. Sherbert in its ruling in *Sherbert v.erner*, *supra*. In the instant case Mr. Thornton, unlike Mrs. Sherbert, if accommodated, would not have received any money as a result of the accommodation requirement but merely would have been excused from working on his Sabbath.

This Court recently, in *Thomas v. Review Board*, 450 U.S. 707, 720-721 (1981), stated:

The respondents contend that to compel benefit payments to Thomas involves the state in fostering a religious faith. There is, in a sense, a "benefit" to Thomas deriving from his religious

beliefs, but this manifests no more than the tension between the two religion clauses which the Court resolved in *Sherbert*:

In holding as we do, plainly, we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to foreclose.

This Court has held that even material aid to individual members of a particular religion often is permissible "indirect" aid to religious institutions. Illustrative cases include *Everson v. Board of Education*, 330 U.S. 1 (1947); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). This Court has recognized that the language of the religion clauses of the First Amendment is at best opaque and has held that "[i]n the absence of precisely-stated constitutional prohibitions, we must draw the establishment line with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activities.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). It is respectfully submitted that the Connecticut statute does not place the state in the position of sponsoring, financially supporting, or actively becoming involved in the religious activities of Mr. Thornton's faith.

The requirement of §53-303e compels no greater inquiry into an employee's religious practice or the scope of religious activities than was required in *Sherbert v. Verner, supra*; *Wisconsin v. Yoder, supra*; or *Thomas v. Review Board, supra*. It is difficult to see how the Connecticut Supreme Court reached the conclusion that the Connecticut statute required "comprehensive, discriminatory and continuing state surveillance." There is "no evidence of contact with church authorities" being required by §53-303e. *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984). Neither is there anything like the "comprehensive, discriminatory and continuing state surveillance" or the "enduring entanglement" present in *Lemon, supra*, 403 U.S. at 619-622." *Id.* at 1364.

Most recently this Court in *Lynch v. Donnelly, supra* at 1359, specifically stated that the Constitution "affirmatively mandates accommodation, not merely tolerance of all religions and forbids hostility toward any . . . [citations omitted] Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause . . . [citations omitted] Indeed, we have observed, that hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion.'"

In this industrialized nation of ours, where the majority dictates more and more the affairs of life, it is vital to protect the interests of those who march to the beat of a different drummer. It is to the benefit of this great nation that we provide a home and haven for all religious thought. The Connecticut statute, guaranteeing protection at the labor marketplace, cannot and should not be struck down, for to do so makes a mockery of one of the primary purposes of the religion clauses of the First Amendment.

Justices Goldberg and Harlan, in *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963), said:

The basic purpose of the religion clauses of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

CONCLUSION

For the reasons set forth herein, the judgment of the Supreme Court of the State of Connecticut must be reversed.

Respectfully submitted,

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**PETITIONER'S
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

ESTATE OF DONALD E. THORNTON, Petitioner,
and
STATE OF CONNECTICUT, Intervenor,
v.
CALDIA, Inc., Respondent.

On Writ Of Certiorari To The
Supreme Court of Connecticut

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QUESTION PRESENTED

Whether a Connecticut statute that protects religious observers against being compelled to work on the day of the week they observe as their Sabbath violates the Establishment Clause of the First Amendment.*

* There were no other parties to the original hearing before this Court than those named in the title. The State of Connecticut has become an intervening party in the proceeding before this Court.

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¶ 457:1887 (Tenn. Jan. 19, 1979)	18
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D. Bourdin, <i>The Discoverers</i> (1980)	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 63-1138

Estate of Donald E. Treadon, Petitioner,
and

State of Connecticut, Intervenor,
v.

Calder, Inc., Respondent.

On Writ Of Certiorari To The
Supreme Court of Connecticut

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Pet. App. 1a-18a)¹ is reported at 291 Conn. 236, 464 A.2d 785. The opinion of the Superior Court for the Judicial District of Hartford-New Britain (Pet. App. 19a-21a) is unreported.

REVISIONS

The decision of the Supreme Court of Connecticut was entered on September 6, 1962. On November 22, 1962,

¹ Material contained in the Joint Appendix is cited herein as "J.A."

_____² Material contained in the Appendix to the Petition for a Writ of Certiorari is cited as "Pet. App. _____.²"

Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 4, 1984 (Pet. App. 24a). On January 4, 1984, Justice Marshall further extended the time within which to file a petition for a writ of certiorari to January 11, 1984 (Pet. App. 25a). On March 5, 1984, the Court granted the petition for a writ of certiorari. 104 S.Ct. 1438 (1984). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

STATUTE INVOLVED

Section 53-300e of the Connecticut General Statutes is set forth in its entirety in Pet. App. 2a, n.1.

STATEMENT

I. Thornton Is Hired.

In early 1975, Petitioner Donald E. Thornton, a devout Presbyterian who observed Sunday as his Sabbath (J.A. 16a, 72a), accepted employment as a department manager with Caldor, Inc., a chain of New England retail stores. At that time, Caldor's Connecticut stores were closed on Sundays, pursuant to Connecticut's Sunday-closing laws. Conn. Gen. Stat. §§ 53-300 to 53-303 (1975 ed.).

In 1976, the Connecticut General Assembly revised the State's Sunday-closing laws. The new legislation authorized certain kinds of businesses to be open and certain products to be sold on Sundays. However, Section 5(a) of the 1976 law, Conn. Gen. Stat. § 53-300e(a), specified that no employee could be required to work more than six days in any calendar week. The 1976 modifications also included the provision whose constitutionality is at issue in this case. Section 5(b) of the statutory revision, Conn. Gen. Stat. § 53-300e(b), provided (Pet. App. 2a, n.1):

No person who states that a particular day of the week is observed as his Sabbath may be required by

his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.

2. Thornton Is Asked To Work on Sundays.

Following enactment of this law, Caldor opened its Connecticut stores on Sundays and required that its managerial employees be available to work approximately every third or fourth Sunday (Pet. App. 3a; J.A. 35a). As manager of the men's and boys' clothing department in Waterbury, Thornton initially acquiesced in his employer's demand, working a total of 31 Sundays in 1977 and 1978 (Pet. App. 3a; see J.A. 71a). In October 1979, Thornton was transferred to Caldor's Torrington store to manage the men's, boys' and shoe departments. He continued to work on Sundays, as directed, during the first part of 1979. However, in November 1979, after consulting an attorney and learning of the statutory protection of his right not to work on his Sabbath, Thornton asked that he be excused from work on Sundays because he observed that day as his Sabbath (Pet. App. 3a; see J.A. 72a, 77a-78a).

Caldor executives refused to honor Thornton's request. Instead, they offered either to transfer him to a management job in a Massachusetts store that was closed on Sundays, or to demote him to a non-supervisory position in the Torrington store, which would not require Sunday work but would cut his pay almost in half, from \$14.45 to \$13.50 per hour (Pet. App. 3a).

B. Thornton's Employment Is Terminated.

Thornton rejected the Massachusetts transfer because of the hardship involved in the long commute from his Connecticut home to the store (Pet. App. 3a; J.A. 71a). Caldor responded by demoting Thornton to a rank-and-

file employee in the Torrington store. Finding the demotion and attendant pay cut unacceptable, Thornton ceased work on March 8, 1980 (Pet. App. 3a). On May 6, 1980, he filed a grievance with the State Board of Mediation and Arbitration (J.A. 1a-2a; see Pet. App. 3a).

4. The Administrative Proceeding.

The Board of Mediation held an evidentiary hearing on July 14, 1980 (J.A. 25a-31a). Several company employees testified about their conversations with Thornton, and one claimed that he had written Thornton a letter in December 1979 confirming a conversation in which Thornton had agreed to work on Sundays in 1980 (J.A. 54a). Thornton was the only witness testifying on his own behalf. He denied having had such a conversation or receiving such a letter (J.A. 71a-74a). He testified that he had been told initially that he had to work on Sundays, and that if he did not, "the company will find one way or another to get rid of you" (J.A. 71a). He also testified, on cross-examination, to details regarding his Sunday observance. He said, "[M]y conscience bothers me, sir, when I have to give up my Sabbath" (J.A. 78a), and he explained that when he was forced to work on Sundays he had taken the money he earned on Sundays and given it to his church "in order to live with a decent conscience" (J.A. 72a; see J.A. 78a-79a). On October 20, 1980, the Board decided in Thornton's favor (J.A. 6a-11a). The Board found that Thornton's claim of Sunday observance was sincere. It declared (J.A. 10a):

Mr. Thornton testified that Sunday was his Sabbath. He testified to some extent as to what he would do and would not do as an observance of his Sabbath. The panel felt that Mr. Thornton had justified to the panel, that, in fact, his Sundays were his day of Sabbath.

The Board further found that, under company policy, out-of-state transfers like that suggested to Thornton "were by mutual consent of the company and the employee," so that the transfer proposed to Thornton was "not a company order" that he had refused to obey (J.A. 10a). It also rejected Calder's claim that Thornton had voluntarily resigned by declining the non-supervisory Torrington position at the diminished salary. It held (J.A. 12a):

In the opinion of the majority of the panel, Calder discharged Mr. Thornton as a management employee for refusing to work Sundays, which day was Mr. Thornton's day of Sabbath.

Sustaining Thornton's grievance under the statute, the Board ordered Calder to reinstate him with back pay and compensation for fringe benefits lost during his period of discharge (J.A. 12a-13a). It refused to consider Calder's challenge to the constitutionality of Section 53-30(a) on the ground that, as a quasi-judicial body, it had no authority to pass on the constitutionality of State law (J.A. 9a-10a).

5. The Trial Court.

Calder then filed an application in the Hartford-New Britain Superior Court to vacate the Board of Mediation's award, pursuant to Conn. Gen. Stat. § 53-481 (J.A. 14a-15a). Thornton cross-moved to confirm the Board's award and for an award of costs and attorneys' fees (J.A. 16-21a). The trial court denied Calder's application and granted Thornton's cross-motion to confirm the award (Pet. App. 11a-21a). Relying on *McGowan v. Maryland*, 366 U.S. 420 (1961), the trial judge held that Section 53-30(a) as a whole was constitutional because its primary effect was "to limit the number of days which an employee may be compelled to work to six per week" (Pet. App. 21a). He also concluded that by entitling Sabbath obser-

were individually to select their day of rest rather than prescribing one common day, the statute did not offend the Establishment Clause (Pet. App. 22a).

The statute avoids forcing all employees to conform to Sunday as a day of rest when their own religion may observe a different day as Sabbath. Thus, the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infringing upon any individual's right to practice the religion of his or her choice.

6. The Connecticut Supreme Court.

The Supreme Court of Connecticut reversed.¹ Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 612, 618-19 (1971), it held that Section 53-30(b)(b) "is clearly violative of the establishment clause" (Pet. App. 14a). The court found that the law did not have a "clear secular purpose" (Pet. App. 14a). It rested this conclusion on the fact that the law was designed to "allow those persons who wish to worship on a particular day the freedom to do so" (Pet. App. 14a), and on the use of the term "Sabbath" in the statute, which the court viewed as demonstrating that the law had "religious overtones" and "comes with religious strings attached" (Pet. App. 12a-13a).

The Connecticut Supreme Court also concluded that the state's legislation conferred a benefit "on an explicitly religious basis," since "[o]nly . . . employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing," whereas

¹ The court rejected the Board of Mediation's non-constitutional challenge (1) that the Board lacks power to decide the constitutional question and (2) that Cedar . . . effectively "discharged" Thomas from his managerial position (Pet. App. 18-19a).

employees "who do not 'choose a Sabbath' may not" designate their day off (Pet. App. 18a). It regarded this as an impermissible advancement of religion that infringed the "primary effect" standard of *Lemon's* Establishment Clause test (Pet. App. 18a). Finally, the court held that since the Board of Mediation must evaluate religious practices and activities in passing on a claim of Sabbath observance, the law "creates excessive governmental entanglements between church and state" (Pet. App. 18a).²

INTRODUCTION AND SUMMARY OF ARGUMENT

For as long as Western civilization has accepted a seven-day week, it has also recognized one day of the seven as a religious day of rest.³ The term "Sabbath" has, since the days of the Bible, been defined as the day of the week set aside by divine command for rest and cessation of weekly labor. The issue in this case is whether a State, acting through its legislature, may constitutionally deny a private employer the privilege of allowing an employee to perform labor on the one day in seven which the employee's religious faith recognizes as the Sabbath. The Connecticut Supreme Court held that a law which prohibits such private interference with religious practice is a "law respecting an establishment of religion" within the meaning of the First Amendment. In our view, this Court's decisions—based on the history and purpose of the Bill of Rights—teach that rather than constituting an "establishment of religion," a law which protects

²On February 4, 1992, Thornton died at the age of forty-one. The administrator of Thornton's estate has authorized counsel to administer this action on behalf of the estate.

³ See e.g., G. Durrant, *The Discourses* 53 (1985).

Secular observers against adverse employment consequences attributable to their Sabbath observance is a means of preserving and protecting the "free exercise" of religion—an objective which is at least equal in value and importance to the goal of preventing government "establishment" of religion.

1. We begin our Argument with the proposition, repeatedly enunciated by this Court throughout the many years it has been called upon to interpret and apply the Religion Clauses of the First Amendment, that the common purpose of the two Religion Clauses is to insure that Government exercises "benevolent neutrality" towards religion. There is a significant difference between the separation of church and state, as practiced and envisioned in the United States, and the separation practiced in totalitarian nations whose admitted objectives include the suppression and extermination of organized religion. Our history and our heritage have defined "the basic purpose" of the Religion Clauses (*Wall v. Tax Commission*, 397 U.S. 664, 680 (1970)).

"To insure that no religion be sponsored or favored, none prohibited and none inhibited. . . . We will not tolerate either governmental establishment of religion or governmental interference with religion, absent of course expressly prescribed governmental acts there is room for play in the joints production of a benevolent neutrality which will permit religious exercises to exist without sponsorship and without interference."

2. The Connecticut Supreme Court failed to appreciate the legitimacy of State laws which are designed to "permit religious exercise to exist without sponsorship and without interference." Rather than measuring the 14th amendment by the constitutional standard applicable to laws which protect Americans against private em-

ployment discrimination on account of race or national origin, the court below applied to the Connecticut law a constitutional standard that this Court has used in passing on the validity of laws that appear to provide sponsorship or financial assistance to churches or to other religious institutions. That constitutional criterion—the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)—is not the correct constitutional yardstick by which to determine the validity of a law protecting religious observance. When a State acts to guarantee to religious observers the cherished liberty freely to exercise their religion, its action should be upheld if the law rationally furthers the legitimate, articulated State purpose of protecting religious freedom and if the law has no invidious discrimination that denies equal protection of the laws. When measured against that correct constitutional standard, Section 53-303e(b) of the Connecticut General Statutes plainly satisfies the constitutional test and should be upheld and applied in this case.

3. We argue finally that even if the three-part test enunciated in *Lemon v. Kurtzman*, *supra*, were applied to this Connecticut law, Section 53-303e(b) would satisfy the constitutional criteria. The Connecticut Supreme Court mischaracterized the "legislative purpose" of the law, as well as its "principal or primary effect." Both the purpose and effect of the law were to eliminate unjustified discrimination in private employment—a worthy and permissible secular purpose and effect. The State has determined that even if a private employer must bear some expense to accommodate the honest conscientious convictions of his employees, that cost is overridden by the importance of preventing bigotry and intolerance in employment. And since no investigation into theological or ecclesiastical questions is permitted under the Con-

necticut law apart from a determination of the *bona fides* of the employee—which parallels issues of subjective good faith that courts must decide every day—there is no real prospect of the kind of “entanglement” that the First Amendment prohibits.

ARGUMENT

I.

The Religion Clauses Of The First Amendment Do Not Prevent Government From Protecting The Exercise Of Religion Against Private Discrimination

This case concerns a law which explicitly protects Sabbath-observers—*i.e.*, those who believe that a particular day of the week is a divinely ordained day of rest—from suffering adverse economic consequences because they carry that belief into practice. The Connecticut Supreme Court concluded that since the law “comes with religious strings attached” (Pet. App. 11a), it is, *ipso facto*, unconstitutional. The court reasoned that a provision of law designed “to allow those persons who wish to worship on a particular day the freedom to do so” (Pet. App. 14a) is unconstitutional because it has a purpose that is other than “secular.” We submit that the First Amendment was never intended to prohibit federal, state or local government agencies from safeguarding the rights of people to worship—or to refrain from labor—on the day of the week that they deem sacred.

It has long been established “that the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963), quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Our First Amendment differs fundamentally from Article 32 of the Constitution

of the Union of Soviet Socialist Republics, which recognizes that “the church . . . is separated from the State,” but which grants freedom only for the dissemination of “anti-religious propaganda” and gives no equivalent protection to expression that favors or supports religion. See A. P. Blaustein and G. H. Flanz, *Constitutions of Countries of the World*, Constitution of the Union of Soviet Socialist Republics, tit. II, ch. 7, art. 52 (Oct. 7, 1977) at 29. This Court has acknowledged that hostility to religion “would be at war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.” *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211-212 (1948). “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Justice Jackson’s warning against “convert[ing] the constitutional Bill of Rights into a suicide pact” (*Terminiello v. Chicago*, 337 U.S. 1, 37 (1949)) has often been quoted. See *American Communications Association v. Douds*, 339 U.S. 382, 409 (1950); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Haig v. Agee*, 453 U.S. 290, 309-10 (1981); *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964). A similar warning may be sounded against converting the First Amendment into a death warrant for religion, or, more particularly, into a license entitling private citizens to destroy religion with acts of bigotry.

The Court below concluded that a legislature is constitutionally disabled from providing statutory protection to “those persons who wish to worship on a particular day” (Pet. App. 14a) because the purpose of such a law is religious, not secular. Government would, by the same reasoning, be prohibited from protecting by law those persons who believe in the Jewish, Christian, or Moslem

faiths, even if they engage in no practice and commit no act that affects their employment. Any law prohibiting discrimination in employment based on religious belief would, by a parity of reasoning, offend the Establishment Clause because its purpose would be "religious" rather than "secular."

The Establishment Clause mandates no such absurd result. It must be read together with the complementary Free Exercise Clause "in light of the single end which they are designed to serve." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). That basic purpose (*id.*):

is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

It is "our remarkable and precious religious diversity as a Nation . . . which the Establishment Clause seeks to protect." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1371 (1984) (Brennan, J., dissenting).

It is firmly accepted that the Establishment Clause forbids the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Accord, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 736, 772 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 234, n.22 (1972); *Gillette v. United States*, 401 U.S. 437, 450 (1971). Equally important, however, the Establishment Clause's mandate of benevolent neutrality forbids not only intentional, "active, hostility to the religious . . .," but also "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). "[C]allous indifference" to the needs of religious

observers runs counter to the Constitution. *Lynch v. Donnelly*, 343 U.S. 305, 314 (1952).

Decisions of this Court make clear that nothing in the Establishment Clause prevents government from protecting religious observers against discrimination in private employment, even though such protection appears to grant special treatment to religious, as opposed to secular, needs. "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties." *Gillette v. United States*, 401 U.S. 437, 454 (1971). In fact, when seemingly neutral government requirements impose a discriminatory burden on religious observers, the Free Exercise Clause frequently requires singling out religious beliefs and practices for special protection.

The leading case of *Sherbert v. Verner*, 374 U.S. 398 (1963), demonstrates that the Establishment Clause does not deny to government the power to protect religious practices such as Sabbath observance. In that case, a Sabbatharian was fired because she conscientiously refused to work on Saturdays when her company, which was closed on Sundays pursuant to State law, expanded its work-week from five to six days and required Saturday labor. Unable to obtain another job that would not force her to violate her Sabbath, the employee filed a claim for unemployment compensation. The State denied her request, ruling that the Sabbatharian's restriction upon her availability for Saturday work made her ineligible under a statutory provision that disqualified insured workers who refused available work for "personal" reasons. This Court recognized that the employee's rights to the free exercise of her religion were significantly burdened by compelling her (374 U.S. at 404)

to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and

abandoning one of the precepts of her religion in order to accept work, on the other hand.

The Court explicitly rejected the argument that the Establishment Clause foreclosed legal protection of individuals who refuse work on religious grounds in order to observe their Sabbath. It explained (274 U.S. at 499):

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatharians in common with Sunday worshippers reflects nothing more than the Government's obligation of neutrality in the face of religious differences, and does not represent that accommodation of religion with secular institutions which it is the object of the Establishment Clause to further.¹³

See also *Thomas v. Review Board*, 430 U.S. 307, 320-321 (1977).¹⁴

¹³It is noteworthy that in *Sherbert v. Verner*, the Court discussed another state statute which protected Sunday observers from religious discrimination in private employment in much the same way that Conn. Gen. Stat. § 50-5(b) protects all Sabbath observers, without remotely suggesting that the legislation violated the Establishment Clause because it was designed to facilitate religious practice. The South Carolina statute provided that when places were authorized to operate on Sundays because of natural emergency (274 U.S. at 498, quoting S.C. Code § 66-4):

an employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday in account of conscience . . . no person be or be held not jeopardize his or her security by such refusal or be discriminated against in any other manner.

The Court observed that "South Carolina expressly covers the Sunday worshipper from having to make the kind of choice which . . . infringes the Sabbatharian's religious liberty."¹⁵ The Court did not suggest in any form that the State's anti-discriminatory statute violated the Establishment Clause so far as it sought to protect Sunday observers from employment discrimination. To the contrary,

Although he dissented in *Sherbert v. Verner*, Justice Harlan agreed that no Establishment Clause problem was created by a statutory exemption limited to Sabbath observers. He concluded that the Establishment Clause permitted "special treatment" of religious conduct, reasoning as follows (274 U.S. at 422-423) (italics omitted):

[T]here would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" . . . is not so narrow a charter that the slightest deviation from an absolutely straight course leads to condemnation. . . . [T]here is . . . enough flexibility in the Constitution to permit a legislative judgment accommodating an employment compensation law to the exercise of religious beliefs.¹⁶

The thrust of the Court's discussion was that its own decision forbidding the Sabbatharian's disqualification from unemployment benefits simply provided Sabbatharians with some measure of the same religious protection that the State had already afforded Sunday worshippers. See 274 U.S. at 499.

¹⁴Compare *Lynch v. Donnelly*, 394 U.S. 535, 538 (1969) (Brennan, J., dissenting) ("although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, set up accommodations . . . the opportunity of individuals to practice their religion"); *Free World Airlines, Inc. v. Marshall*, 462 U.S. 48, 58 (1983) (Marshall, J., dissenting) ("the Court has repeatedly found no Establishment Clause problem in exempting religious observers from state-imposed duties. . . . even when the exemption was in no way compelled by the Free Exercise Clause"); *Fisher v. Richardson*, 433 U.S. 472, 477 (1977) ("neutral laws between" the Establishment and Free Exercise Clauses create a realm of flexibility "within which the legislators may legitimately act" to facilitate religious practice and belief).

Similarly, in *Gillette v. United States*, 401 U.S. 437 (1971), the Court declared that the conscientious objector exemption from conscripted military service, which was intended to spare conscientious objectors "the hard choice" of obeying their personal religious scruples or fulfilling their legal obligation to their country (401 U.S. at 453), was a permissible accommodation under the Establishment Clause. Quoting Chief Justice Hughes' dissent in *United States v. MacIntosh*, 283 U.S. 605, 634 (1931), the Court said (401 U.S. at 453 (footnote omitted)):

apart from . . . whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience."

And in *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961), the Court noted that although not required by the Free Exercise Clause, States voluntarily could provide "an exception" from Sunday closing laws for "people who, because of religious conviction, observe a day of rest other than Sunday."

To be sure, these cases have involved the constitutionality of government action that itself inhibits religious observance, and it is in that area that the Free Exercise Clause of the First Amendment is directly implicated. But the power of government to prevent religious discrimination in various facets of modern human life is as firmly settled as its authority to prevent similar discrimination based on race, national origin, gender, age, or physical handicap. State and federal governments clearly have authority to protect individuals against various forms of private discrimination. See *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260-62 (1964).

This Court has expressly recognized that the State's authority to prohibit religious discrimination is no less than its power to outlaw racial discrimination. In *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945), Justice Frankfurter, in his concurring opinion, observed that States constitutionally could prohibit "racial and religious discrimination against those seeking [private] employment" and explained (326 U.S. at 96 (emphasis added)):

Of course a State may leave abstention from such [private] discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt.

See also 326 U.S. at 94 (majority opinion) (State could "protect workers from [union membership] exclusion . . . on the basis of race, color, or creed"); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938) (elimination of private discrimination "by reason of . . . race or religious beliefs" is an important part of achieving "fair and equitable [employment] conditions").

Nor is governmental authority to protect religious observance limited to protection of belief only. Just as the free exercise of religion includes freedom to act as well as freedom to believe (*Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940)), statutory protection of religion against discrimination, public or private, may include protection of freedom to engage in religious practice, as well as religious belief. To this end, Section 701(j) of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e(j) (1976), defines religion to include:

all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observ-

ance or practice without undue hardship on the conduct of the employer's business.

State and local legislatures have enacted similar laws protecting religious observers.⁷ The reasoning of the Connecticut Supreme Court casts doubt on the constitutionality of these laws under the Establishment Clause. In *Trans World Airlines, Inc. v. Hardison*, 432

⁷ See, e.g., Ariz. Rev. Stat. Ann. §§ 41-1461(6), 41-1463 (1956); Conn. Gen. Stat. § 53-303e (1982); Ga. Code Ann. §§ 10-1-570, 45-19-22 (1982); Ky. Rev. Stat. § 344.030(5), 344.040(1), 436.165(4)(a) and (b) (1975); Md. Ann. Code art. 27, § 492 (Cum. Supp. 1983); id. at art. 49B, § 14-16 (1979); Mass. Gen. Laws Ann. ch. 151B, § 4.1A (West 1976); Mo. Ann. Stat. § 578.115 (Vernon 1979); N.H. Rev. Stat. Ann. § 354-A:3(4) (1955); N.Y. Exec. Law § 296.10 (McKinney 1982) (explicitly accommodating Sabbath observers); Pa. Stat. Ann. tit. 43 § 955.1 (Purdon 1964) (explicitly accommodating Sabbath observers who are public employees); S.C. Code Ann. §§ 1-13-30(k), 1-13-80 (Law Co-op. 1976); Va. Code §§ 40.1-28.2, 40.1-28.3 (1981) (explicitly accommodating Sabbath observers); W. Va. Code § 61-10-27 (1977). Other State laws have been interpreted to require religious accommodation. Alaska Stat. § 18.80.200 (1983), as interpreted in *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, 864 (Alaska 1978); Cal. Const. art. I, § 8, as interpreted in *Rankins v. Comm'n on Professional Competence*, 24 Cal. 3d 167, 173-174, 583 P.2d 852, 856, 154 Cal. Rptr. 907, 911-912 (Cal.), appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979); Iowa Code Ann. § 601A.6(1)(a) (West 1975), as interpreted in *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 602 n.1 (Iowa 1983); Me. Rev. Stat. Ann. tit. 5, § 4572(1)(A) (1979), as interpreted in *Maine Human Rights Comm'n v. Local 1361, United Paperworkers International Union*, 383 A.2d 369, 378 (Me. 1978). In other states, religious accommodations are required by guideline or regulation. See [State Laws] Fair Emplo. Prac. (BNA) ¶ 453:1141 (Colo. Sept. 25, 1980); id. at ¶ 453:1708 (D.C. June 11, 1976); id. at ¶ 453:2756 (Ill. Dec. 12, 1973); id. at ¶ 453:3801 (Kan. May 1, 1978); id. at ¶ 455:1094 (Mich. Dec. 12, 1973); id. at ¶ 455:1901 (Mont. July 14, 1983); id. at ¶ 455:2351 (Nev. Apr. 6, 1961); id. at ¶¶ 457:555-457:556 (Okla. Feb. 25, 1977); id. at ¶ 457:174 (S.D. Dec. 16, 1979); id. at ¶ 457:1887 (Tenn. Jan. 19, 1979).

U.S. 63 (1977), the constitutional issue was not formally resolved, but Justice Marshall's dissenting opinion made the constitutional point persuasively (432 U.S. at 90-91):

If the State does not establish religion over non-religion by excusing religious practitioners from obligations owed the State, . . . [it is difficult to] see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.

II.

A Rationality Standard, Rather Than The Three-Part Test Of *Lemon v. Kurtzman*, Is The Correct Constitutional Criterion For Judging This Anti-Discrimination Law

The Connecticut Supreme Court approached the constitutionality of Section 53-303e(b) in a fundamentally erroneous manner by applying to the law the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The *Lemon* test is not the proper standard for evaluating the constitutionality of legislation safeguarding an individual's right to practice his religion. The correct test is a rationality standard, which is the same test used for reviewing other anti-discrimination laws.

A. There is no single establishment clause test.

This Court has repeatedly rejected the notion that "any single test or criterion," including specifically the *Lemon v. Kurtzman* test, provides the only standard when an Establishment Clause challenge is asserted. *Lynch v. Donnelly*, 104 S.Ct. 1355, 1362 (1984); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773, n.31 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). Instead, the Court has interpreted and applied the Religion Clauses by taking into account the

principle of accommodation and our tradition of religious liberty and pluralism. *Lynch v. Donnelly*, 104 S.Ct. 1355, 1361 (1984); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970).

Throughout the development of its Establishment Clause jurisprudence, this Court has sought to appraise a challenged law or program in light of the practical risk of the evils which the Establishment Clause was intended to prevent. The Establishment Clause must be interpreted in light of "the [Framer's] contemporaneous understanding of its guarantees," and the Court must then scrutinize "challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 104 S.Ct. at 1359, 1361.⁶ The limitations erected by the Establishment Clause are "variable," and whether they have been transgressed depends "on all the circumstances of a particular relationship." 104 S.Ct. at 1362, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

⁶ See 104 S.Ct. at 1383 (Brennan, J., dissenting), quoting *Abington School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) ("central inquiry in [Establishment Clause] cases [is] whether the challenged practices 'threaten those consequences which the Framers deeply feared'"); *Mueller v. Allen*, 103 S.Ct. 3062, 3069 (1983) (evaluating constitutionality of financial aid program benefiting parochial schools by comparing challenged practice "to the evils against which the Establishment Clause was designed to protect"); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970) (the Establishment Clause must be construed with reference to its "ultimate constitutional objectives as illuminated by history"); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947) ("whether . . . [a] law is one respecting an 'establishment of religion' requires an understanding of . . . background and environment of the period in which that constitutional language was fashioned and adopted").

This Court has, accordingly, adopted different standards of review for different kinds of Establishment Clause problems. It has applied "strict scrutiny" in cases where there is evidence that legislation grants a denominational preference or overtly discriminates against a particular church—one of the core evils at which the Establishment Clause was aimed. See *Larsen v. Valente*, 456 U.S. 228, 244-46 (1982). And it has used the three-part *Lemon* test to evaluate practices such as tax-funded financial aid programs that benefit religious institutions. See, e.g., *Mueller v. Allen*, 103 S.Ct. 3062 (1983); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). That test has also been used for government actions that may "enmesh churches in the exercise of substantial governmental powers . . ." (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)), or government conduct that may directly implement religious observance or doctrine (e.g., *Lynch v. Donnelly*, 104 S.Ct. 1355, 1362-65 (1984); *Stone v. Graham*, 449 U.S. 39 (1981); *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

By contrast, in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983), the Court used neither strict scrutiny nor the *Lemon v. Kurtzman* test in upholding the constitutionality of legislative prayer. Rather, the Court's Establishment Clause analysis rested on the historical acceptance of the challenged practice by the Framers of the First Amendment (103 S.Ct. at 3334-36), and on the Court's practical assessment that the conduct presented "no real threat" of the "establishment" of religion as the Framers understood that term. 103 S.Ct. at 3337.

B. The rationality standard applies to Section 53-303e(b).

The correct approach to Establishment Clause review of legislative measures to accommodate the needs of religious observers, such as Section 53-303e(b), is to apply a rationality test. Legislation in this area need only "rationally" further the "legitimate, articulated state purpose" of accommodating individual religious belief and practice. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); *McGowen v. Maryland*, 366 U.S. 420, 425-26 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-91 (1955). This rationality standard has been traditionally used to determine the constitutionality of anti-discrimination statutes, and the Connecticut law involved in this case is such a statute.

The *Lemon v. Kurtzman* test is designed to discover whether particular legislation has either a purpose or a primary effect which is constitutionally forbidden. By definition, however, a law protecting religious freedom is a constitutionally encouraged means of implementing the values of the Free Exercise Clause. A law which has the primary effect of preserving religious freedom is to be commended, not invalidated as beyond the power of government. Thus it is senseless to make the constitutionality of a law prohibiting discrimination on grounds of religion depend on an analysis of its legislative purpose and of its primary effect. By these criteria, the law's emphasis may be "religious," rather than "secular," but it is "religious" in a totally benign fashion.¹

¹Some lower courts have recognized that the *Lemon* test is not the correct measure to decide the constitutionality of government action aimed at protecting individual rights to practice religion freely. See, e.g., *Tonley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-45 (9th Cir.), cert. denied, 454 U.S. 1059 (1981) (using *Lemon* criteria merely

Application of the *Lemon v. Kurtzman* standard therefore leads to confusion and to absurd consequences that defeat the purpose of the Religion Clauses.¹⁰ There are significant differences between statutes protecting religious observance and laws of the kind which this Court has invalidated under the *Lemon* test. Anti-discrimination legislation is, of course, far removed from "conditions and practices" that the Framers of the Establishment Clause "fervently wished to stamp out in order to preserve [religious] liberty for themselves and for their posterity." *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). An anti-discrimination law provides no financial aid to organized religion. It does not compel attendance at state-sanctioned churches, or dictate reli-

as an alternative test); *Jordan v. North Carolina National Bank*, 399 F.Supp. 172, 179-80 (W.D.N.C. 1975), *rev'd on nonconstitutional grounds*, 565 F.2d 72 (4th Cir. 1977).

¹⁰ Utilization of the *Lemon* test has led some judges to the mistaken view that government action seeking to accommodate individual religious beliefs and practices violates the Establishment Clause merely because its purpose is to safeguard the free exercise of religion. See, e.g., *Cummins v. Parker Seal Co.*, 516 F.2d 544, 555-58 (6th Cir. 1975) (Celebrezze, J., dissenting), *aff'd by an equally divided court*, 429 U.S. 65 (1976), *vacated and remanded on nonconstitutional grounds*, 433 U.S. 903 (1977); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 456-58 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981) (Pell, J., dissenting); *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 91-92 (N.D. Ga. 1981) (*dictum*); *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108, 112 (N.D. Ga. 1980); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622, 626-33 (W.D. Pa. 1979), *vacated on other grounds*, 613 F.2d 482 (3d Cir. 1980); *Anderson v. General Dynamics Convair Aerospace Division*, 489 F. Supp. 782, 789 (S.D. Cal. 1980), *rev'd*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Yott v. North American Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

gious doctrine or observance. Nor does it create a risk of religious control over our democratic processes or generate political strife by the efforts of "established sects to maintain their absolute political and religious supremacy." 330 U.S. at 8-11. See, e.g., *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (1983) (identifying the dangers which Framers of First Amendment sought to prevent); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Engel v. Vitale*, 370 U.S. 421, 423-33 (1962); *McGowan v. Maryland*, 366 U.S. 420, 460, 463-65 (1961) (Frankfurter, J., concurring). It protects all religious groups equally, and does not favor any one religion.

In fact, Connecticut's anti-discrimination measure safeguards the very religious liberty that the Establishment Clause seeks to preserve. When an employee is discharged for refusing to work on his Sabbath, even when Sabbath work is demanded by facially neutral employment requirements, he effectively is discharged "because of [his] faith" (*Sherbert v. Verner*, 374 U.S. 398, 410 (1963)), and suffers discrimination on religious grounds. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), cert. denied, 454 U.S. 1046 (1981).

Section 53-303e(b) thus does not involve the traditional Establishment Clause danger of preferential treatment for religion. It simply relieves observant individuals of a special burden that is not imposed upon those who observe no Sabbath and who are not compelled by their faith to respect a particular day as a religious day of rest. See, e.g., *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), cert. denied, 454 U.S. 1046 (1981) (Title VII "does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer . . ."); *Tooley v. Martin-Marietta*

Corp., 648 F.2d 1231, 1245 (9th Cir.) cert. denied, 454 U.S. 1098 (1981) ("accommodation places [religious observers] on an equal footing with other employees whose religious convictions find no impediment in the workplace"). See also *Wisconsin v. Yoder*, 406 U.S. 205, 234-35, n.22 (1972) (special exemption does not "favor" Amish but simply removes "heavy impediment" to free exercise that application of facially neutral law would impose).

The distinguishing characteristics of anti-discrimination legislation identify it as precisely the sort of government action for which the First Amendment's principle of accommodation allows "play in the [legislative] joints." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). Decisions as to how best to shield pluralistic religious opportunities, such as Sabbath worship, from the discriminatory impact of private employment policies are the sort of issues "quite rightly hammered out on the legislative anvil." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (Rehnquist, J., dissenting). Substantial judicial deference is therefore due to the legislative judgment embodied in Conn. Gen. Stat. § 53-303e, which balances individual religious interests against the interests of employers, consumers, and non-religious employees. See, e.g., *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting).

The Connecticut statute protecting Sabbath observers against private employment discrimination should, therefore, be tested for Establishment Clause purposes not by the *Lemon v. Kurtzman* standard, but by the same rationality standard used to determine the constitutionality of laws prohibiting other forms of invidious

private discrimination.¹¹ Just as a State may forbid private employment discrimination based on race, gender, age, national origin or physical handicap, it may enact legislation to outlaw private discrimination on account of religious belief or observance. The primary constitutional limitation on such anti-discrimination legislation is that "the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta*

¹¹ See, e.g., *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109, 110 (1953) (legislation which "prohibits discrimination on the basis of race in the use of [privately owned] facilities serving a public function is within the police power of the state"); *Newsweek Magazine v. D.C. Commission on Human Rights*, 376 A.2d 777, 782 (D.C. App. 1977), cert. denied, 434 U.S. 1014 (1978) (District of Columbia law prohibiting racial discrimination in employment valid as "a 'reasonable . . . police regulation . . .'"); *Hutchinson Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308, 517 P.2d 158, 162 (Kan. 1973) (city ordinance forbidding employment discrimination on basis of race, religion, color, sex, national origin or ancestry "is proper exercise of . . . police power"); *Veeder-Root Co. v. Commission of Human Rights and Opportunities* 4 Fair Emp. Prac. Cases 783, 786 (Super. Ct., Hartford County April 17, 1972), quoting *Southern New England Telephone Co. v. Public Utilities Commission*, 144 Conn. 516, 523, 134 A.2d 351 (1957) (constitutionality of Connecticut Fair Employment Practices Act, Conn. Gen. Stat. §§ 31-122-31-128 "must be assessed 'from the standpoint of upholding the legislation as a valid enactment unless there is no reasonable ground upon which it can be sustained . . .'"); *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962) (upholding constitutionality of Kansas City ordinance outlawing racial discrimination in public accommodations as valid exercise of municipal police power under rationality standard of review); *Pittsburgh v. Plumbers Local 27*, 1 Fair Empl. Prac. Cases 89, 90, 95 (Penn. County Court, Allegheny County June 1965) (upholding constitutionality of city ordinance prohibiting private employment discrimination because of race, color, or religion as "reasonable" exercise of police power).

Motel, Inc. v. United States, 379 U.S. 241, 262 (1964). In addition, of course, the law may not invidiously discriminate among beneficiaries. Such discrimination would violate the principle of equal protection and would invalidate the law. In this case, the statutory protection extends to all Sabbath-observers, regardless of the faith they espouse. Consequently, it satisfies the constitutional standard of equality.

What Chief Justice Marshall said for this Court long ago in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), applies equally today to legislation prohibiting religious discrimination in private employment:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

Under the test of rationality uniformly applied in the discrimination context, the Connecticut law—like the federal statute protecting religious observers and like comparable state and local legislation in numerous other jurisdictions—is rationally related to an end permissible under the Establishment Clause and is therefore plainly constitutional.

III.

Even Under The Test Of *Lemon v. Kurtzman*, The Connecticut Statute Satisfied Constitutional Standards

The standard of judicial review set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), provides that government action is constitutional under the Establishment Clause if it satisfies the following "cumulative criteria" (403 U.S. at 612-613):

First, the statute must have a secular legislative purpose; second, its principal or primary effect must

be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

Numerous federal and state appellate court decisions have held that the Establishment Clause is not violated by the religious anti-discrimination provision of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(j), 2000e(a)(1) (1976),¹² or by parallel State anti-discrimination laws.¹³ The law at issue in this case also passes the constitutional test if the three-part standard of *Lemon* is applied.

A. The statute has a secular legislative purpose.

Lemon's first criterion is that government action, to be constitutional, must have "a secular purpose." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970) (emphasis added). There is no requirement that legislation serve "exclusively secular" objectives." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1363, n.6 (1984) (emphasis added). As this

¹² Every federal court of appeals that has considered the issue under the *Lemon* standards has upheld the constitutionality of Title VII's religious accommodation provision. See, e.g., *McDaniel v. Esser International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245-46 (9th Cir.), cert. denied, 454 U.S. 1398 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 453-55 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551-54 (8th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65 (1976), vacated and remanded on nonconstitutional grounds, 433 U.S. 903 (1977).

¹³ See, e.g., *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350, 353 (Ky. Ct. App. 1982), cert. denied, 103 S.Ct. 3115 (1983); *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852, 858-59, 154 Cal.Rptr. 907, appeal dismissed, 444 U.S. 986 (1979).

Court emphasized only last Term, if "exclusively secular" were the test, "much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* Thus, government action is unconstitutional for lack of a secular purpose "only when . . . there [is] no question that the statute or activity was motivated wholly by religious considerations." 104 S.Ct. at 1362. Contrary to the Connecticut Supreme Court's view (Pet. App. 14a), the fact that one of the purposes of the law is the protection of individual opportunities for Sabbath observance does not automatically invalidate the law under the first part of the *Lemon* test.

There is a significant secular purpose in securing equal employment opportunities for Sabbath observers who otherwise would be discharged or would be unemployable whenever an employer prefers to hire someone who does not have distinctive practices and commitments. The aim of providing employment opportunities for persons who hold sincere religious convictions qualifies as a legitimate secular purpose. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90-91, n.4 (1977) (Marshall, J., dissenting); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852, 859, 154 Cal. Rptr. 907, appeal dismissed, 444 U.S. 986 (1979). A related goal is relieving observant individuals of the burden of [having to] choose between their jobs and their religious convictions." *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), cert. denied, 454 U.S. 1046 (1981). This Court has recognized that in avoiding "a hard choice between contravening imperatives of religion and conscience or suffering penalties," a legislature achieves a distinct secular purpose.

one which respects "the value of conscientious action to the democratic community at large." *Gillette v. United States*, 401 U.S. 437, 445 (1971). See also *Cummins v. Parker Seal Co.*, 516 F.2d 544, 552-53 (6th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65 (1976), vacated and remanded on nonconstitutional grounds, 433 U.S. 903 (1977).

The Connecticut Supreme Court concluded that Section 53-303e(b) lacked a secular purpose because the law used the term "Sabbath" and because it authorized Sabbath observers to designate their day off in order "to allow those persons who wish to worship on a particular day the freedom to do so" (Pet. App. 12a-14a). But the mere usage of the term "Sabbath" does not establish the absence of a secular purpose. The Maryland Sunday-closing law upheld by this Court in *McGowen v. Maryland*, 366 U.S. 420 (1961), was entitled "Sabbath Breaking." It referred to Sunday as "the Sabbath day," and it forbade work on "the Lord's day." 366 U.S. at 445. Yet this Court found that this language was not sufficient "evidence of religious purpose" to invalidate the statute, even in light of the undeniably religious historical origins of Sunday-closing laws. 366 U.S. at 445-49.

Nor is the purpose of the law invalidated because, as a result of the law, its beneficiaries may engage in Sabbath worship. In *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), this Court held that the proper issue for *Lemon's* "purpose" analysis was not whether the symbol utilized by a municipality in that case was religious in nature, but whether the city utilizing it had a secular purpose in displaying it. 104 S.Ct. at 1362-63. The Court pointedly observed that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its

invalidation under the Establishment Clause." 104 S.Ct. at 1362. It then declared (104 S.Ct. at 1362-1363):

The District Court plainly erred by focusing almost exclusively on the creche. . . . The display is sponsored by the City to celebrate the [national Christmas] Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

There is surely no less of a "secular purpose" to the law at issue in this case.

B. The primary effect of the statute is not to advance religion.

The Connecticut law also passes the second, "primary effect" part of the *Lemon* standard. The "effect" of the Connecticut law is not to "benefit" Sabbath observers, but to remove a discriminatory hurdle to their equal employment. Whatever "benefit" Sabbath observers have because they are permitted to select a particular day off (Pet. App. 15a) is indirect and ancillary, and does not render the law unconstitutional. See, e.g., *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir.), cert. denied, 454 U.S. 1098 (1981). The primary effect of the law is the same as that of Title VII's religious accommodation provisions—"to inhibit discrimination, not to advance religion." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 553 (6th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65 (1976), vacated and remanded on nonconstitutional grounds, 433 U.S. 903 (1977).

Indeed, there is nothing in Section 53-303e(b) that directly advances religion. The statute does not compel employees who belong to Sabbath-observing religions to refrain from working on the Sabbath; it only enables them to choose to take the day off and then to respect their Sabbath. Nor does the law require or encourage employ-

ees to engage in any religious activities, such as attendance at worship services, on their designated Sabbaths.

Hence this legislation does no more for the advancement of the Sabbath-observer's religion than the Sunday-closing law did for all faiths that observed Sunday as a day of rest. It provides an opportunity for religious observance. Yet Sunday-closing laws were found constitutional in *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), despite their "undeniable" effect of "render[ing] it somewhat more likely that citizens would respect religious institutions and even attend religious services." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1363, n.11 (1984), quoting *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 776 (1973). See *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350, 353 (Ky. Ct. App. 1983), cert. denied, 103 S.Ct. 3115 (1983).

It is also significant for Establishment Clause purposes that whatever benefit eventually does come to religion from accommodating Sabbath observance does so only as a result of the private decisions of individual employees. Under the First Amendment, "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 801 (1973) (Burger, C.J., concurring in part and dissenting in part). This is because the mediating role of individual choice means that "no imprimatur of State approval . . . can be deemed to have been conferred on religion or religious practice." *Mueller v. Allen*, 103 S.Ct. 3062, 3069 (1983); cf., *Board of Education v. Allen*, 392 U.S. 236, 243-44 (1968).

Nor is religion impermissibly advanced simply because the law authorizes Sabbath-observers, but not employees who do not observe a Sabbath, to select a particular day

off. The First Amendment renders it permissible for government to accommodate individual religious claims while declining to make adjustments for analogous strongly held secular beliefs. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that in order for the Amish to be exempt from compulsory high school attendance, their demand for special treatment had to rest on religious convictions, and not "on purely secular considerations." 406 U.S. at 215. The Court explained that this was because "to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Id.* Accord, *Thomas v. Review Board*, 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion").

Government does not offend the Establishment Clause by exempting from military service individuals who object to participation in all wars because of their personal religious beliefs (whether traditional or non-traditional) without also exempting persons who object to war on political, sociological, or philosophical grounds, however passionately espoused. See *Gillette v. United States*, 401 U.S. 437, 454, 457 (1971). And in *Sherbert v. Verner*, 374 U.S. 398 (1963), persons who declined available work because it conflicted with their Sabbath observance were constitutionally exempted from certain eligibility requirements for unemployment compensation even though persons who declined work for nonreligious "personal" reasons could still be denied benefits under the state's general disqualification rule. 374 U.S. at 401-02, n.4.

Nor is religion unconstitutionally advanced because non-observant employees may be inconvenienced by

being assigned to work on a weekend day in order to accommodate a fellow employee's statutory rights of Sabbath observance. When conscientious objectors are exempted from military service, non-objectors must serve in their stead at a risk of death or serious injury. Exempting real estate owned by religious institutions from property taxes may increase the tax burden on wholly secular property owners, who must bear the cost of providing municipal services to all, including the exempt religious institutions. Yet both of these practices are constitutional. *Gillette v. United States*, 401 U.S. 437, 452-53, n.17 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970). It follows that the employment burden on non-observant co-workers likewise does not transgress Lemon's second requirement. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 455 (7th Cir.), cert. denied, 454 U.S. 1046 (1981).¹⁸

¹⁸ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), is not to the contrary. That case involved only the statutory construction of Title VII, not an interpretation of the Establishment Clause. See 432 U.S. at 70, 74. The Court held that Title VII, which expressly limits the employer's duty to making "reasonable accommodations" not entailing "undue hardship," did not statutorily require the employer to accommodate Sabbatarian observance through any of three specific alternatives on the grounds that each "would have been an undue hardship within the meaning of the statute." 432 U.S. at 77. Although the Court did state that Title VII did "not contemplate" depriving more senior workers of their seniority rights in order to accommodate Sabbatarians, the discussion was rooted in Title VII's "reasonable accommodation" limitation and in "the fact that seniority systems are afforded special treatment under Title VII itself." 432 U.S. at 81.

Finally, this case presents no facts justifying any finding of "undue hardship," and the Connecticut courts have not had an opportunity to construe Section 53-303e(b) to determine whether an "undue hardship" exception would be implied, as a matter of state law, into the statute. Hence questions relating to the constitutionality of such a law in a situation where it imposes an undue hardship on an employer are not presented on this record.

Moreover, Section 53-303e(b) is not rendered unconstitutional on its face merely because it contains no proviso comparable to the "undue hardship" language of Section 701(j) of the federal Civil Rights Act of 1964. The Connecticut legislature has determined that an employee has an unqualified right not to violate a conscientious belief that he may not work on the Sabbath. If the consequence of that decision is additional expense or even "undue hardship" to his employer, Connecticut law assigns that cost, as part of the price of liberty, to the employer. That is within a legislature's permissible power to allocate the economic benefits and burdens of the employment relationship.

C. The statute does not create government entanglement with religion.

Finally, Section 53-303e(b) meets Lemon's prohibition against excessive government entanglement with religion. For Establishment Clause purposes, "entanglement is a question of kind and degree." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1364 (1984). What is constitutionally proscribed is "ongoing, day-to-day interaction between church and state," such as that involved in "comprehensive, discriminating, and continuing state surveillance" of religious activity, or the exercise of governmental power by religious institutions. See, e.g., *Larkin v. Grendel's*

Den. Inc., 459 U.S. 116, 126 (1982); *Lemon v. Kurtzman*, 403 U.S. 602, 611-25 (1971).

The protection of individual opportunities for Sabbath observance afforded by Section 53-303e(b) does not threaten excessive government entanglement with religion. Under the statute, Connecticut is only involved with religion "for the purpose of outlawing religious discrimination in employment. This certainly cannot be interpreted as 'excessive entanglement' in any sense of the words." *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W. 2d 350, 353 (Ky. Ct. App. 1982) cert. denied, 103 S.Ct. 3115 (1983).

Moreover the statute primarily involves employers and employees. It directs employers to give workers who declare "that a particular day of the week is observed as [their] Sabbath" that day off. No direct government involvement occurs at all unless arbitration is needed to resolve a dispute over an employee's entitlement to designate a particular day as his Sabbath.

This potential government involvement does not create "excessive entanglement." Whether a particular day is observed as the Sabbath by a given religion is unlikely to be open to serious dispute. See, e.g., *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65 (1976), vacated and remanded on nonconstitutional grounds, 433 U.S. 903 (1977). While the law may require the State to determine the sincerity of an individual employee's claimed Sabbath observance, this involves no more government entanglement with religion than similar inquiries necessary for implementing numerous other religious accommodations which are plainly constitutional.

For example, the conscientious-objector exemption from military service requires a determination of the

sincerity of the individual's religious basis for objecting to participation in all wars. *Gillette v. United States*, 401 U.S. 437, 454 (1971). Determining whether a church qualifies for property tax exemptions involves a judgment as to the *bona fides* of the church. *Walz v. Tax Commission*, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 (Harlan, J., concurring). Exempting students from compulsory school attendance on First Amendment grounds involves an investigation of whether formal education conflicts with their religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972). And exempting self-employed individuals from Social Security taxes requires proof of membership in "a recognized religious sect . . . and [adherence to its] established tenets . . . conscientiously oppos[ing] . . . participation in" public insurance systems. *United States v. Lee*, 455 U.S. 252, 255-56, n.4 (1982). See also *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 455 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975), aff'd by an equally divided court, 429 U.S. 65 (1976), vacated and remanded on nonconstitutional grounds, 433 U.S. 903 (1977).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Connecticut should be reversed and Conn. Gen.

Stat. § 53-303e(b) should be deemed constitutional and applied in this case.

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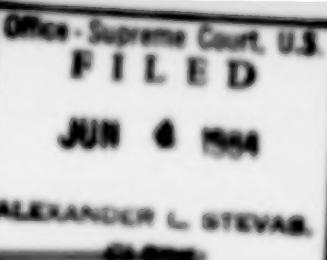
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June 1, 1984

SUPPORT BRIEF



No. 83-1158

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON, Petitioner,

and

STATE OF CONNECTICUT, Intervenor,

v.

CALDOR, INC., Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF INTERVENOR STATE OF CONNECTICUT IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

Does the Establishment Clause of the First Amendment Prescribe State Statutes Designed to Prevent Religious Discrimination by Private Employers?

Does the Establishment Clause of the First Amendment Prescribe State Statutes That Do Nothing More Than Impose upon Private Employers the Same Obligation of Non-Discrimination Imposed upon the State by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), and Its Progeny?

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In the Supreme Court of the United States

October Term, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON, Petitioner,
and
STATE OF CONNECTICUT, Intervenor.

B.
CALDO, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF OF INTERVENOR STATE OF CONNECTICUT

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 191 Conn. 336, 494 A.2d 785 (1983), and is set forth in the Appendix to the Petition for Certiorari at pages 1a-18a. Citations to the opinion in this brief are to the Petitioner's Appendix.

JURISDICTION

The decision of the Supreme Court of Connecticut was entered on September 6, 1983. On November 22, 1983, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 4, 1984. On January 4, 1984, Justice Marshall further extended the time within which to file a petition for a writ of certiorari to January 11, 1984. The Petitioners filed a Petition for Writ

of Certiorari on January 11, 1984, and the Intervenor filed a Brief Supporting the Petition for Writ of Certiorari and Motion to Intervene as of Right on February 10, 1984. This Court granted the requested Writ of Certiorari on March 8, 1984 and granted the requested Motion to Intervene on March 19, 1984. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions at issue in this case, the First Amendment to the United States Constitution and Connecticut General Statutes §53-305e, are set forth in Appendices A and B to this Brief.

STATEMENT OF THE CASE

In 1975, the Petitioner's decedent, Donald E. Thornton, began working as a department manager for the Respondent, Caldor, Inc., the owner and operator of a large chain of department stores in Connecticut and neighboring states. Thornton's first position was in Caldor's Waterbury, Connecticut store; he later transferred to the Tarrington, Connecticut store.

When Thornton began working for Caldor, Connecticut's Sunday closing law was in effect, and, in compliance with that law, Caldor closed on Sundays and did not require its employees to work on that day. In 1977, however, following the invalidation of the closing law by the Connecticut courts,¹

¹State v. Anonymous, 33 Conn. Supp. 55, 364 A.2d 244 (C.P. 1976); State v. Anonymous, 33 Conn. Supp. 141, 366 A.2d 200 (C.P. 1976). See also *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979).

Caldor began conducting business on Sundays. As part of this new policy, Caldor began to require department managers, including Thornton, to work one out of every four Sundays.

Thornton, a devout Presbyterian, sincerely believed that his religion obliged him to observe a Sunday sabbath and forbade him to work on that day. J.A. at 71a, 71a. Nonetheless, he complied with Caldor's new work policy because he feared for his job, because he needed the income to support his family, and because he was unaware of the possibility that state law protected his right to refuse to work on his sabbath. J.A. at 71a. Between 1977 and 1979, therefore, Thornton worked a total of 31 Sundays. J.A. at 46a.

In November, 1979, after obtaining legal advice, Thornton informed Caldor that he would no longer work on Sundays because that day was his sabbath. J.A. at 34a-35a; 55a-56a. He also informed the store that he had been advised that his right not to work on his sabbath was protected by Connecticut General Statutes §53-305e, which reads in pertinent part:

- (b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.²

Thornton subsequently met several times with Caldor executives in an attempt to negotiate an arrangement so-

²Conn. Gen. Stat. §53-305e (1982). The full text of the statute is set out in Appendix B, *infra*, and an overview of its legislative history is presented in Appendix C, *infra*.

ceptable to both sides. Caldor finally refused to allow Thornton to remain in the position of department manager in its Torrington, Connecticut store unless he agreed to work on Sundays. Instead, it offered him two alternatives: he could continue as a department manager in one of its Massachusetts stores (the Massachusetts stores did not require Sunday work); or he could work in the Torrington store in a non-managerial capacity (under the union contract, non-managerial employees were not required to work Sundays). J.A. at 61a-62a. Thornton declined the first alternative because transfer out of state would have substantially increased his commuting time; he declined the second because demotion to a non-managerial position would have meant a reduction in salary from \$6.45 per hour to \$3.50 per hour. J.A. at 69a; 70a; 72a-74a.

When Caldor insisted on demoting him, Thornton refused to report to work.⁷ Instead, he filed a grievance with the State Board of Mediation and Arbitration pursuant to

⁷There is no evidence in the record to indicate that Caldor would have suffered undue hardship had it accommodated Thornton's need for Sundays off. Indeed, the record appears to the contrary. Were Caldor to have replaced Thornton with another managerial employee, its expenditure for wages would have been identical to its expenditure if Thornton himself had worked on Sunday—at hourly wage at the premium rate of time-and-a-half. J.A. at 61a. Moreover, Thornton, who was already being replaced three Sundays per month, clearly was not essential on the one Sunday a month he was asked to work. And, there was no legal or contractual impediment—such as a seniority plan for shift assignment—preventing Caldor from reassigning Thornton's workweek by switching his schedule with another employee.

The record shows only that Caldor feared that other employees would complain if they were asked to work while Thornton was excused. J.A. at 61a. But, in the context of anti-discrimination statutes, such complaints by fellow employees

§53-303e. J.A. at 1a-2a. Caldor defended by asserting that Thornton had not been “discharged” within the meaning of the statute and by attacking the statute as an establishment of religion in violation of the First Amendment to the United States Constitution. J.A. at 3a-5a. After determining that Thornton had been improperly “discharged” in violation of §53-303e, the Board concluded that it did not have authority to entertain Caldor’s constitutional challenge, and it ordered Caldor to reinstate Thornton and reimburse him for the lost pay and fringe benefits he would have received had he not been discharged. J.A. at 9a-12a.⁸

Caldor moved in Hartford-New Britain Superior Court to vacate the Board’s ruling, and Thornton cross-moved to confirm the award. The court granted Thornton’s cross-motion and affirmed the Board’s decision. It addressed Caldor’s constitutional argument and ruled that the statute did not violate the Establishment Clause.

The Connecticut Supreme Court reversed, holding that §53-303e violated the Establishment Clause of the First Amendment. In reaching that result, the Connecticut court purported to apply the three-part test announced by this Court in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973): To be constitutionally ac-

have been held not to constitute undue hardship absent serious, demonstrable effects on morale and business functioning. See, e.g., *McDaniel v. Essex International, Inc.*, 696 F.2d 34, 37-38 (1982); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 402 (1978) (“even proof that employees would grumble about a particular hardship is not enough to establish undue hardship.”). Cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 775 (1976).

⁸Thornton died on February 4, 1982. Since that time this action has been maintained by his Estate, which would receive the damages for lost pay and fringe benefits owed to Thornton by Caldor under the order of the Board of Mediation.

ceitable, a challenged statute "first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion." 413 U.S. at 772-73, quoted in Pet. App. at 10a. In the Connecticut Supreme Court's view, §53-303e failed all three parts of the *Nyquist* test.

Relying heavily on the "religious overtones" of the word "Sabbath" used in the text of the statute, the court first held that the statute lacked a clearly secular purpose.⁵ In the Court's view, "subsection (a) of §53-303e, which prohibits employment for more than six days in any calendar week, adequately addresses the valid secular purpose . . . of forbidding uninterrupted labor." Pet. App. at 12a. Therefore, the sabbath provision in subsection (b) had no purpose other than "to allow those persons who wish to worship on a particular day the freedom to do so." Pet. App. at 14a.

The court also held that §53-303e had the primary effect of advancing religion. While conceding that the statute neither favored one religion over another nor provided material benefits to religious institutions, the court nevertheless viewed the statute as granting a benefit "on an explicitly religious basis." Pet. App. at 15a. This benefit—the right to specify the day on which one will not work—was unavailable to non-religious workers; non-religious workers, though free by virtue of subsection (a) from being required to work more than six days a week, had no right to specify their day off. Conferring such a "benefit" on religious workers alone constituted, in the Connecticut court's view, impermissible aid to religion. Pet. App. at 15a.

⁵The court rejected Thornton's contention that the term "sabbath" as used in the statute could be construed to mean "day of rest" without religious purport. Pet. App. at 12a-13a.

The Connecticut court also found that §53-303e created an excessive entanglement of government and religion. Pet. App. at 15a. It concluded that "[i]nevitably, as employers challenge the sincerity of employees' Sabbath observance, the [state's] inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities that may fairly be labelled 'observance of Sabbath.'" Pet. App. at 15a-16a. For the Connecticut court, this "inevitable" inquiry was, by itself, a violation of the separation of church and state.

The Connecticut Supreme Court based its decision solely on the federal Constitution; indeed, it expressly foreswore reliance on the Connecticut Constitution. Pet. App. at 11a n.7. Consequently, the Petitioner sought and was granted a writ of certiorari from this Court; and the State of Connecticut sought and was granted permission to intervene in defense of §53-303e and in favor of reversing the decision of the Connecticut Supreme Court.

SUMMARY OF ARGUMENT

This Court has indicated that, taken together, the Religion Clauses forbid certain accommodations of religion by government, require others, and permit (while not requiring) still others. Because every governmental accommodation of religion necessarily (and intentionally) entails a benefit to religion, the traditional purpose-effect-entanglement standard developed by the Court in some of its Establishment Clause decisions must be employed flexibly and in conjunction with principles defining the scope of appropriate governmental accommodation of religion. Viewed this way, the decisions of this Court make clear that, while the Constitution does not require Connecticut to accommodate religion as it has chosen to do in §53-303e, it surely permits it to do so.

The decision of the Connecticut Supreme Court ignores and contradicts the decisions of this Court defining the scope of appropriate governmental accommodation of religion. None of those decisions was discussed or even cited in the court's opinion. This Court has delineated a zone of legislative discretion where accommodation of religion is neither required nor forbidden. Neutral non-coercive accommodation of religious beliefs has been approved in numerous instances where it is not mandated by the Free Exercise Clause. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971) (exemption of conscientious objectors from military service is a permissible, though not required, accommodation of religious belief). Here, the Connecticut legislature merely has forbidden the kind of religious discrimination in the workplace highlighted by the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). Donald Thornton was discharged for refusing to work on his sabbath—for refusing to subordinate his religion to his job. If an employer discharges an employee for refusing to work on his or her sabbath, the employer has, in fact, discharged the employee because he or she is a sabbath observer. If it is not an "establishment of religion" for the State of Connecticut *itself* to accommodate sabbath observers as part of its unemployment compensation scheme (as Connecticut is required to do by *Sherbert*), then it cannot be an "establishment of religion" for the State to require private employers to provide the same accommodation.

In addition to ignoring the controlling precedents of the Court authorizing accommodation of religion in proper circumstances, the Connecticut Supreme Court seriously misapplied the applicable decisions of this Court on the meaning of the Establishment Clause of the First Amendment. Section 53-30b has a clearly secular purpose and effect—the equalization of employment opportunities by minimizing the discriminatory impact of employment practices upon re-

ligious individuals. Neither religious activities nor religious institutions are directly sponsored or subsidized by the statute; a sabbath observer freed from work on his or her sabbath because of the statute may go to a religious service or not. Finally, the statute does not impermissibly entangle the government and religion, because it requires no more government involvement in religion than the concededly nonexcessive entanglement that occurs when the state must determine whether a purported church qualifies for a property tax exemption.

ARGUMENT

I.

INTRODUCTION: FORBIDDEN, REQUIRED, AND PERMISSIBLE ACCOMMODATIONS OF RELIGION

On numerous occasions this Court has considered the underlying bases and the practical applications of the First Amendment's Religion Clauses—the Establishment Clause and the Free Exercise Clause. At times it has struggled to reconcile the occasionally contradictory pulls of those two clauses. In so doing, the Court has explained that the joint purpose of the Establishment and Free Exercise Clauses is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). At the same time, however, the Court has recognized that "total separation is not possible in an absolute sense" and that "[s]ome relationship between government and religious organizations is inevitable." *Id.* Indeed, the Court has indicated that in some contexts accommodation of religion by government is not only

acceptable but also important to the preservation of the values protected by the First Amendment.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . ." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach*, *supra*, at 314. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum*, *supra*, at 211-212.

Lynch v. Donnelly, 104 S.Ct. 1385, 1399 (1984).

This Court has indicated that, taken together, the Religion Clauses forbid certain accommodations of religion by government, require others, and permit (while not requiring) still others. See, e.g., *McCollum v. Board of Education*, 333 U.S. 203 (1948) (forbidding an accommodation of religion); *Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring an accommodation); and *Gillette v. United States*, 401 U.S. 437

(1971) (permitting, while not requiring, an accommodation). See generally, L. Tribe, *American Constitutional Law* §§14-4 and 14-5 (1978).

Because every governmental accommodation of religion—many of which the Court has held to be constitutionally required or permitted—necessarily (and intentionally) entails a benefit to religion, it is obvious that the traditional purpose-effect-entanglement standard developed by the Court in some of its Establishment Clause decisions must not be applied mechanically and in isolation. To do so would be to lock the doctrines of this Court in hopeless contradiction. Thus, the tripartite standard must be employed, as this Court has employed it, flexibly and in conjunction with the decisions defining the scope of appropriate governmental accommodation of religion.

In the decision below, the Connecticut Supreme Court applied the purpose-effect-entanglement standard without considering the decisions of this Court requiring and permitting accommodation. *Sherbert*, *Gillette*, and cases like them were neither discussed nor cited. Moreover, the court below compounded its error by woodenly applying the tripartite standard in a way that distorted its terms and ignored the values it seeks to promote.

In fact, analysis of this Court's decisions defining the scope of appropriate governmental accommodation of religion makes clear that, while the Constitution does not require the state of Connecticut to accommodate religion as it has chosen to do in §53-303e, it surely permits it to do so. Moreover, properly applied, the purpose-effect-entanglement standard poses no threat to the constitutional validity of §53-303e—indeed, it demonstrates that the provision does not contravene the Establishment Clause.

II.

THE DECISION OF THE CONNECTICUT
SUPREME COURT
INVALIDATING §53-30(e) IGNORES AND
CONTRADICTS THE HOLDINGS OF THIS COURT
DEFINING THE SCOPE OF APPROPRIATE
GOVERNMENTAL ACCOMMODATION OF RELIGION

A long line of cases—never discussed or even cited by the Connecticut Supreme Court—clearly establishes that accommodation of religion by government is often permitted and sometimes required, even though any such accommodation necessarily entails a benefit to religion. This line of cases dictates the conclusion that §53-30(e) is a permissible accommodation of religion.

In *Sherbert v. Verner*, *supra*, this Court held that the Free Exercise Clause mandated state accommodation of the religious beliefs of a sabbath observer.⁵ Sherbert, a Sabbatharian, had worked for thirty-seven years in a textile mill when, because of a work schedule change, she was required to work on Saturdays. She refused and was fired. When she filed a claim for unemployment compensation, South Carolina's Employment Security Commission denied the claim, citing her unwillingness to accept Saturday work. Sherbert sued the Commission, charging a violation of her right to the free exercise of her religion, but she lost in the state courts.

⁵The term “sabbath observer” designates one who sets apart one day during the week as a holy day, different from other days, and who believes that it is inappropriate to work on that day. For example, most Christians consider Sunday, most Jews consider Saturday, and most Muslims consider Friday as their sabbath. The term “Sabbatarian” designates a sabbath observer who observes Saturday as his or her sabbath.

This Court reversed, finding that the pressure upon Sherbert to forgo the practices of her religion was “unmistakable.” 374 U.S. at 404. South Carolina could not “constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions” Id. at 410. The Court conceded that its decision conferred a benefit on Sherbert because she was a Sabbatharian, but it saw no Establishment Clause problem:

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatharians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

Id. at 409. The Court reaffirmed *Sherbert* (with only one Justice dissenting) in *Thomas v. Review Board*, 450 U.S. 707 (1981), quoting with approval the passage just cited. Id. at 719-20.⁶

⁶Significantly, even the dissenters in *Sherbert* and *Thomas* would have allowed the states to accommodate the religious beliefs of Sherbert and Thomas, though they would not have required the accommodation. *Thomas v. Review Board*, *supra*, 450 U.S. at 723 (Rehnquist, J., dissenting); *Sherbert v. Verner*, *supra*, 374 U.S. at 422-23 (Harlan, J., dissenting).

See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the Free Exercise Clause requires Wisconsin to accommo-

Sherbert and its progeny stand for the proposition that, read together, the Religion Clauses of the First Amendment occasionally will require government to accommodate religion. But the Court has made clear that "the limits of permissible state accommodation of religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause." *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). This Court has delineated a zone of legislative discretion where accommodation of religion is

date the desire of Amish parents to withdraw their children from school after the eighth grade in contravention of the state's compulsory education law). Once again, while conceding that accommodating the religious beliefs of the Amish conferred a benefit upon them, the Court found no Establishment Clause problem:

What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In *Walz v. Tax Commission*, the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. 664, 668 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose.

Id. at 234-35 n.22.

neither required nor forbidden. See generally L. Tribe, *American Constitutional Law* §§14-4 through 14-7 (1978).

Thus, in *Gillette v. United States*, 401 U.S. 437 (1971), the Court held that, if it desired to do so, Congress could exempt conscientious objectors from military service. Writing for the Court, Justice Marshall noted:

Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience."

Id. at 453.

On at least two occasions, this Court has indicated that state programs expressly designed to accommodate the needs of sabbath observers were within the legislative discretion of the states—the zone of permissible accommodation. In *Brownfield v. Brown*, 360 U.S. 509 (1961), a decision upholding a state law requiring businesses to close on Sundays, Chief Justice Warren, in his opinion for the Court, volunteered that, where a state chooses to enact a Sunday closing law, it "may well be the wiser solution" to permit Sabbatharian merchants to open for business on Sunday in contravention of the general requirement that businesses remain closed on that day, thereby enabling them to take their day off on their sabbath. *Id.* at 608. Then, one year later, in *Arlin's Department Store, Inc. v. Kentucky*, 371 U.S. 218 (1962), the Court dismissed for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws enacted for

the benefit of those who observe a sabbath on a day other than Sunday.

Moreover, in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), this Court considered the provision of Title VII of the Civil Rights Act that places an affirmative obligation upon employers to accommodate employees' religious practices—a provision that in many ways parallels §53-303e.⁶ In

⁶Equal Employment Opportunity Act of 1972, Pub. L. No. 90-281, §2, 86 Stat. 103 (1972) (modified at 42 U.S.C. §2000e(j) (1981)).

Title VII of the Civil Rights Act, as amended in 1972, requires employers to make "reasonable accommodations" to the religious needs of employees where such accommodations can be made without undue hardship on the conduct of business. On the other hand, Connecticut's §53-303e might be read to require employers to accommodate the religious needs of employees whose belief in sabbath observance prevents them from working on what ordinarily would be a working day—and to accommodate those needs regardless of the cost. Thus, the Solicitor General assumed that §53-303e is "a state statute that goes further than Title VII" in accommodating religion. Brief for the United States as Amicus Curiae in Support of the Petition at 11.

The Solicitor General's assumption may not be warranted. Before its decision in this case, the Connecticut Supreme Court had no occasion to define the scope of the accommodation provision contained in §53-303e and, beyond indicating that on the facts of this case the provision covered Donald Thornton, the decision below does not address the scope of the statute. Therefore, it is not clear whether under the Connecticut statute the employer's right to accommodation is absolute or whether, if confronted with a case that required it to do so, the Connecticut Supreme Court would recognize by implication the kind of "undue hardship" defense that is contained in Title VII.

There is no evidence in the record to establish that Calder would have suffered undue hardship as a result of accommodating Thornton's need to observe his sabbath. See note 3, *supra*. On this record, Calder would have been required to

Hardison, a Presbyterian sought a ruling that he was entitled under the statute to be excused from working on his sabbath. While the majority did not reach the constitutional issue, Justice Marshall did, and his opinion indicates that Title VII's accommodation provision does not violate the Establishment Clause:

[T]he constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problem in exempting religious observers from state-imposed duties, even when the exemption was in no way compelled by the Free Exercise Clause.

432 U.S. at 90 (Marshall, J., dissenting) (citations omitted).

In the years since *Hardison* several lower courts have held that Title VII requires employers to permit employees time off to observe religious holidays (absent special circum-

accommodate Thornton's religious beliefs—even if the Connecticut court had read §53-303e as identical to Title VII. Moreover, because the sweeping reasoning employed by the Connecticut Supreme Court compelled invalidation of any accommodation of religion (even the "reasonable accommodation absent undue hardship" provision of Title VII), it was unnecessary for the Connecticut court to determine whether §53-303e requires accommodation in all circumstances.

In short, this is not a case where §53-303e was applied to require that an employer accommodate the religious beliefs of an employee even in the face of undue hardship. See note 8, *supra*. And, it is not clear that §53-303e would ever be applied to require accommodation in the face of undue hardship. On the facts of this case, there is little, if any, difference between §53-303e and Title VII.

claims), but none of those courts has expressly addressed the constitutional issue.⁷ Several courts have applied Title VII to require accommodation of religious beliefs other than a belief in the sabbath, however, and some of those courts have addressed challenges to Title VII based upon the Establishment Clause. Most of the courts that have reached the issue—including all of the courts of appeals to consider it—have found the accommodation provision of Title VII constitutionally acceptable.⁸ These opinions, though drawn from fact situations different from the one below, stand for the proposition that the state is well within the bounds of constitutional propriety when it chooses to accommodate religion in a manner similar to the accommodation embodied in §53-303a.⁹

⁷See, e.g., *Brown v. General Motors Corp.*, 601 F.2d 996 (5th Cir. 1979); *Petrie v. White*, 601 F. Supp. 403 (S.D. Tex. 1979).

⁸*McDonald v. Evans International*, Inc., 626 F.2d 34 (5th Cir. 1980); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (5th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Tonley v. Martin Marietta Corp.*, 648 F.2d 1239 (5th Cir.), cert. denied, 454 U.S. 1099 (1982); *National v. Smith Steel Workers*, 643 F.2d 443 (7th Cir.), cert. denied, 454 U.S. 1245 (1982); *Hardison v. Trans World Airlines*, Inc., 627 F.2d 53 (5th Cir. 1979), cert'd on other grounds, 453 U.S. 63 (1977); *Cummins v. Parker Seal Co.*, 518 F.2d 544 (5th Cir. 1975), aff'd non. by equally divided Court, 429 U.S. 43 (1976), remanded and remanded, 433 U.S. 963 (1977); *Jordan v. North Carolina Nat'l Bank*, 329 F. Supp. 172 (W.D.N.C. 1973), cert'd on other grounds, 400 F.2d 72 (4th Cir. 1977).

⁹(See also, *Lynch v. Donnelly*, *supra*, 104 S.Ct. at 1389 (Brennan, J., dissenting) ("[A]lthough the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion."); *McDonald v. Petry*, 438 U.S. 618, 629 (1978)

The Connecticut Supreme Court did not discuss or even cite a single case from among the decisions of this Court delineating the zones of required and permissible accommodation of religion. Yet, taken together, those cases show clearly that §53-303e is an accommodation of religion falling within the zone of permissible accommodation. Chief Justice Warren's comments for the Court in *Braunfeld* and the Court's summary treatment of *Arian's Department Store* indicate clearly that, if it chooses, the government may take steps to relieve sabbath observers of burdens placed upon the practices of their faith by apparently neutral rules. And *Hardison*, while not dispositive of the constitutional issue here, does demonstrate that some measures designed to accommodate sabbath observers in the workplace are constitutionally acceptable.

It is *Sherbert*, however, that most clearly dictates the result in this case. Of course, no claim is made that the accommodation involved here is required by the Constitution, as was the accommodation in *Sherbert*. Nonetheless, *Sherbert* shows that §53-303e, like the exemption for conscientious objectors at issue in *Gillette v. United States*,

(Brennan, J., concurring) ("[G]overnment [may] take religion into account when necessary . . . to create without state involvement an atmosphere in which voluntary religious exercise may flourish."). See, e.g., *Mueller v. Allen*, 103 S.Ct. 3062 (1983) (holding that a state may provide tuition tax credits for parents of parochial school children); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (holding that Congress may exempt religious school employees from federal unemployment taxes); *Walz v. Tax Commission*, *supra* (holding that the state may, consistently with the dictates of the Establishment Clause, exempt church property from taxation).

supra, is well within the zone of permissible accommodation. The result in *Sherbert* represented a response to the realities of the workplace and of the employment market: Absent accommodation, *Sherbert* would have been faced with a cruel choice between her unemployment benefits and her conscience. Given the threat posed to religious liberty interests by the state's program, the Court ruled that an accommodation was constitutionally mandated. Section 53-303e, like *Sherbert*, represents a response to the realities of the workplace and of the employment market: Absent protection, a sabbath observer would be faced with a choice in some ways more harsh than that faced by *Sherbert*—a choice between his job and his conscience. In a sense, the threat posed to religious liberty interests is even greater here. Only the fact that the state itself has not caused the problem moves us from the zone of required accommodation. But to say the state may not choose to address the problem would be perverse.

In §53-303e, the Connecticut legislature merely has forbidden the type of discrimination highlighted by *Sherbert*. If an employer discharges an employee for refusing to work on his or her sabbath, the employer has, in fact, discharged the employee because he or she is a sabbath observer; hence, the employer is guilty of religious discrimination. Section 53-303e does nothing more than extend to the private sector the neutrality preserved in the public sector by *Sherbert*. If it is not an "establishment of religion" for Connecticut itself to accommodate sabbath observers as part of its unemployment compensation program, then it cannot be an "establishment of religion" for the state to require private employers to make the same accommodation.¹²

¹²Section 53-303e imposes upon a private actor (the employer) the costs, however minimal (see note 3, *supra*), of accommodating the needs of sabbath observers. This fact is immaterial

Connecticut is not required to ensure the same degree of accommodation of religion in the private sector that it must provide in the public sector—but *Sherbert* and decisions of

to First Amendment analysis, however. Requiring one private party to accommodate another's religious practice no more implicates the state in "sponsorship, financial support, or active involvement . . . in religious activity," *Walz v. Tax Commission*, *supra*, 397 U.S. at 668, than does accommodation by the state itself. See also *Trans World Airlines v. Hardison*, *supra*, 432 U.S. at 90-91 (Marshall, J., dissenting). No greater cost could be imposed on a private actor than the duty to go to war, a cost imposed upon those citizens who are willing to fight and who are selected in the draft to fill the spaces of conscientious objectors; yet, this court did not consider an assessment of that cost, imposed upon a private actor, relevant in determining whether government had impermissibly identified itself with religion by granting exemptions from service to conscientious objectors. *Gillette v. United States*, *supra*. See also *Walz v. Tax Commission*, *supra* (non-exempt taxpayers pay higher taxes because of tax-exempt status of religious organizations); *Thomas v. Review Board*, *supra*, and *Sherbert v. Verner*, *supra* (taxpayers pay increased taxes to support claims in the unemployment insurance fund made by those who quit for religious reasons).

If Thornton had lost his job because he could not work on his sabbath, the State of Connecticut would have been required under *Sherbert*, *supra*, to extend unemployment benefits to him. It is not of constitutional significance that the state imposes a burden of accommodation on a private party, so long as the due process clause is not thereby violated. Cf. *City of Revere v. Massachusetts General Hospital*, 103 S.Ct. 2979 (1983) (city is required to ensure that detainees receive medical treatment, but "how the city . . . obtains such treatment is not a federal constitutional question"); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) (state may require employers to give their employees four hours off from work with full pay in order to vote).

this Court following it make it clear that the Establishment Clause does not prohibit it from doing so."¹²

III.

THE DECISION OF THE CONNECTICUT SUPREME COURT INVALIDATING §53-303e MISAPPLIES THE HOLDINGS OF THIS COURT ON THE MEANING OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Each of the decisions of this Court discussed in Section II, *supra*, considered an Establishment Clause challenge to a governmental accommodation of religion that necessarily entailed a benefit to religion. Each of those decisions held that the accommodation did not violate the Establishment Clause. And, since §53-303e is well within the zone of permissible accommodation, those decisions dictate the conclusion that §53-303e does not violate the Establishment Clause. Nonetheless, the Connecticut Supreme Court fixated on the fact that §53-303e benefits sabbath observers, ignored the cases discussed in Section II, and, based upon an erroneous interpretation of an Establishment Clause test developed by this Court, held that §53-303e violated the First Amendment.

¹²The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, [ST/IDP/714 (1982)], lists as a basic protected right the freedom "to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief." Id., Art. 6(h). The United States, which took the lead in drafting the document, is a signator to it. It is unthinkable that state legislation, such as §53-303e, which merely ensures that liberty, would violate the First Amendment.

The Connecticut Supreme Court purported to apply the standard enunciated by this Court in *Committee for Public Education v. Nyquist, supra*.¹³ Nyquist requires, first, that a challenged statute serve a clearly secular legislative pur-

¹³Unlike the court below, this Court has been unwilling, even in cases raising only Establishment Clause issues, to limit analysis of challenges arising from the Establishment Clause to any single test or standard. See, e.g., *Lynch v. Donnelly*, 404 U.S. 535, 1362 (1984); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). Indeed, just this Term, in *Lynch v. Donnelly, supra*, this Court said:

In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

¹⁴*Id.* at 1361. See also *Walz v. Tax Commission, supra*, 397 U.S. at 669.

On the *Donnelly* test—whether the challenged statute in reality establishes or tends to establish a religion or religious faith—§53-303e is unquestionably valid. Nothing about it "pose[s] a real danger of establishment of a state church." *Id.* at 1366. Indeed, by safeguarding the right of every person to observe whatever sabbath he or she chooses to observe, §53-303e provides a protection—beyond that ensured by the First Amendment—against the establishment of a state church.

power; second, that its primary effect be neither to advance nor inhibit religion; and, third, that it avoid excessive government entanglement with religion. See also *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). But, the decision below misapplied the Nyquist standard. In fact, when it is properly applied, it demonstrates that §53-303e does not violate the Establishment Clause.

(1) Purpose. This Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. See, e.g., *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968); *Arlington School District v. Schenck*, 374 U.S. 313, 323-24 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962). Even where the benefits to religion were substantial, as in *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Waltz v. Tax Commission*, *supra*; *Tilton v. Richardson*, *supra*; and *Maurer v. Allen*, 363 U.S. 2062 (1963), this Court found a secular purpose acceptable under the Establishment Clause.

Section 53-303e was designed for a clearly secular purpose—to achieve equality of employment opportunity by eliminating discriminatory employment practices. It is intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, thereby protecting the employment opportunities of those who are intentionally or unintentionally disadvantaged because their religious convictions are not reflected in socially neutral majoritarian rules.¹² In this regard, it is part of "our happy tradition" of

"avoiding unnecessary clashes with the dictates of conscience." *United States v. Marinko*, 283 U.S. 625, 634 (1931) (Hughes, C.J., dissenting). See also *Gillette v. United States*, 401 U.S. 437, 453 (1971); *Arlington School District v. Schenck*, 374 U.S. 313, 324-25 (1963) (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. 420, 431-32 (1961). Like the exemption for conscientious objectors from the draft, §53-303e reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience.

An employee who is fired for adhering to his or her religious convictions, as Thornton was, has, in effect, been discharged because of his or her religion. That employee is a victim of religious discrimination, and it is undeniable that the purpose of preventing such discrimination is a valid secular purpose. See, e.g., *Hardison*, *supra*, at 90-91 n.4 (Marshall, J., dissenting) ("The purpose . . . of requiring [exemptions of religious observers from work rules] is the wholly secular one of securing equal economic opportunity to members of minority religions").¹³

asking of prospective employees whether they observe any Sabbath, it becomes clear that the purpose of §53-303e is abolition of religious discrimination in employment. The cumulative result of these sections is that religious practices cannot be made a criterion of employment.

¹²Provisions of Connecticut law other than §53-303e also bar religious discrimination in employment. See Conn. Gen. Stat. §10a-44 (1979). That provision, however, prohibits only intentionally discriminatory practices. *Williams v. Commission on Civil Rights*, 28 Conn. Sup. 343, 280 A.2d 899 (Super Ct.), aff'd, 158 Conn. 422, 242 A.2d 143 (1969) (it did not violate the Connecticut Civil Rights Act when an employer terminated an employee who refused, based on religious convictions, to work on her Sabbath). In enacting §53-303e, the legislature

¹³When subsection (b), prohibiting employers from requiring employees to work on the employees' Sabbath, is read in conjunction with subsection (d), which prohibits employers from

The Connecticut Supreme Court, noting that subsection (a) of §53-30(e) "adequately addresses the valid secular purpose . . . of forbidding uninterrupted labor" by prohibiting employment for more than six days in any calendar week, Pet. App. at 12a, concluded that the sabbath provision in subsection (b) had no purpose other than "to allow those persons who wish to worship on a particular day the freedom to do so." Pet. App. at 14a. It ignored the fact that the state has a valid interest in seeing that qualified persons obtain jobs—and that they do not lose them for reasons like race, sex, or religion. It ignored the fact that government may validly seek to equalize employment opportunities by minimizing the discriminatory impact of employment practices upon religious individuals. The "six day week" provision of subsection (a), which is aimed only at assuring an interruption in work for all, does nothing to ameliorate the burden potentially placed on religious persons. Indeed, the "six day week" provision, standing alone, would tend strongly to favor those who celebrate a Sunday sabbath, because Sunday would remain the most likely day for a business to close. Only the addition of a provision like §53-30(e) ensures true equality.¹⁰

recognized that facially neutral practices, such as requiring Sunday work, often burden, whether intentionally or not, the employment opportunities of religious minorities.

¹⁰The conclusion of the court below that §53-30(e) lacked a primary secular purpose is impossible to square with the decision of this Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), upholding Maryland's Sunday Closing Law. The plaintiffs in those cases were Orthodox Jewish merchants who contended that requiring them to close their shops on Sunday unconstitutional established a practice—the Sunday Sabbath—of the dominant Christian religion. The court noted that the law served "not merely to provide a one-day-in-seven work stoppage," but also "to set one day apart from all others as a day

(2) *Effect.* The primary effect of §53-30(e) is the protection of employment opportunities for all by preventing religion and religious discrimination from being factors in the workplace. The statute does not have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another. It confers no affirmative benefit on those accommodated, but rather relieves them of a special burden that others do not suffer by permitting them to fulfill their employment obligations without violating their religion. That some faiths have more or different kinds of religiously dictated observances than others does not invalidate a law that applies to all equally. There is no requirement that an accommodation, to be valid, must be enjoyed by all.

There is no danger that §53-30(e) might communicate "a message of government endorsement or disapproval of re-

of rest, repose, recreation, and tranquility." 366 U.S. at 430. The court held that the state could permissibly take note of the majority's preferences in choosing which day to specify as the common day of rest—preferences undoubtedly the product of religious tradition. Id. at 431-42.

The Connecticut Supreme Court distinguished *McGowan* from the instant case, asserting that, unlike the Maryland statute at issue in that case, §53-30(e) lacks the "valid secular purpose of providing a common day of rest for both religious and non-religious citizens." Pet. App. at 12a. In so holding, the court below ignored this Court's express approval, in *Brownfield v. Brown*, 366 U.S. 599 (1961), of exemptions from Sunday closing laws for those who observe a sabbath other than Sunday. Id. at 608 (dictum); see also 366 U.S. at 610 (Frankfurter, J., concurring); id. at 676-77 (Douglas, J., dissenting). The reasoning of the Connecticut Supreme Court produces an anomalous result: A state may enforce a common day of rest on Sunday in deference to the religious practices of the majority, but it may not act to allow members of religious minorities to observe their own day of rest.

ligion," *Lynch v. Donnelly*, *supra*, 104 S.Ct. at 1368-69 (O'Connor, J., concurring). Connecticut in no way sponsors or endorses Thornton's religious beliefs by requiring Calder to allow him the freedom to practice them. Nor does §53-303e produce any pressure on non-believers to conform to designated religious practices. Any benefit to religion conferred by §53-303e is incidental—certainly as incidental as the benefit conferred by Sunday closing laws which this Court upheld in *McGowen v. Maryland*, *supra*. Neither religious activities nor religious institutions are sponsored or subsidized, directly or indirectly. Neither the state nor the private employer is required to support a religious activity or institution. Whatever benefit §53-303e may produce for religious activities and institutions is the sort of indirect and remote benefit that this Court has consistently upheld. See, e.g., *Mueller v. Allen*, *supra*; *Walmar v. Vincent*, 454 U.S. 263, 273 (1981); *Roeper v. Board of Public Works*, 436 U.S. 736, 747 (1978); *Board of Education v. Allen*, 392 U.S. 236, 244 (1968); *McGowen v. Maryland*, *supra*, 296 U.S. at 443-44. A sabbath observer freed from work on his or her sabbath because of the law may go to a religious service or not. And, the statute does not require that the sabbath observer be paid for the hours he or she does not work.

The Connecticut Supreme Court, while conceding that §53-303e neither favored one religion over another nor provided material benefits to religious institutions, nevertheless concluded that the statute had the primary effect of advancing religion because, in the view of that court, it conferred a benefit on "an explicitly religious basis" because "[o]nly those employees who designate a Sabbath are entitled not to work on that particular day . . ." Pet. App. at 15a. But religious accommodations have been upheld by this Court against Establishment Clause challenge—even though they, like §53-303e, are keyed to a "religious" basis. See, e.g., *Gillette v.*

United States, *supra*, 491 U.S. at 482 n.17 (draft exemptions for conscientious objectors); *Walz v. Tax Commission*, *supra* (tax exemptions for religious organizations). See generally Section II, *supra*. And more importantly, the statute provides no benefit to sabbath observers; it merely restores them to a position of equality with their non-observing co-workers. Neither must violate conscience in order to work.

(3) *Entanglement.* Section 53-303e presents no danger of an excessive entanglement of government and religion. It establishes no administrative relationships between government and religious institutions; individuals, not religious institutions, are the statute's intended and actual beneficiaries. The government is required only to ascertain whether an individual sincerely believes that his religion compels him or her to observe a particular day as a sabbath. This is a question of credibility with which government agencies and courts deal frequently, *United States v. Ballard*, 322 U.S. 78 (1944), and it is essentially the same determination required in implementing other religious exemptions. *Thomas v. Review Board*, *supra*; *Gillette v. United States*, *supra*; *Walz v. Tax Commission*, *supra*; *Sherbert v. Verner*, *supra*.

The court below found excessive entanglement because it concluded that "[i]nevitably, as employers challenge the sincerity of employees' Sabbath observance, the [state's] inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may be labeled 'observance of Sabbath.'" Pet. App. at 15a-16a. That analysis misses the mark. The Establishment Clause prohibits only excessive government entanglement. *Walz v. Tax Commission*, *supra*, 397 U.S. at 674-75. Section 53-303e will not subject religious institutions to the sort of "unreprehensive, discriminating, and continuous [governmental] surveillance" that the Bu-

Supreme Court has found impermissible. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Rather, §(3)(B)(e) requires only a finding that the day in question is the employee's sabbath. In most cases, the issue will not be in dispute. In no case will §(3)(B)(e) require more governmental involvement in religion than the concededly unconstitutional entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. *Waltz v. Tax Commission*, *supra*, 397 U.S. at 674-76; *id.* at 686-90 (opinion of Harlan, J.). See also *Thomas v. Review Board*, *supra*; *Gillette v. United States*, *supra*; *Sherbert v. Verner*, *supra*.

(4) Application of the Standard by Other Courts. The rigid and absolutist interpretation of the tripartite purpose-effect-entanglement test advanced by the Connecticut Supreme Court to invalidate §(3)(B)(e) flatly contradicts the decisions of the vast majority of federal and state courts to consider the constitutionality under the Establishment Clause of measures imposing on employers a duty to accommodate the religious beliefs of employees who, like Thomas, are sabbath observers. *Rankine v. Commission on Professional Competence*, 24 Cal. 3d 387, 580 P.2d 852, 134 Cal. Rptr. 937 (1979), appeal dismissed, 444 U.S. 998 (1980); *Hordman v. Trans World Airlines*, 877 F.2d 33 (8th Cir. 1985), rev'd on other grounds, 432 U.S. 43 (1987); *Cummins v. Parker Seal Co.*, 816 F.2d 544 (8th Cir. 1987), aff'd mem., by equally divided Court, 489 U.S. 45 (1988), vacated and remanded, 483 U.S. 903 (1987); *Kentucky Commission on Human Rights v. Kerna Bakery, Inc.*, 644 S.W.2d 330 (Ky. Ct. App. 1982), cert. denied, 455 U.S. 3335 (1983); *State Division of Human Rights ex rel. Clarke v. Carnation Co.*, 86 A.D.2d 977, 448 N.Y.S.2d 330 (4th Dep't 1982), cert. denied, 455 U.S. 1194 (1983); *North Shore University Hospital v. State Human Rights Appeals Board*, 82 A.D.2d 789, 439

N.Y.S.2d 489 (3d Dep't 1983), appeal dismissed, 455 U.S. 335 (1983).¹⁰ The decision below also conflicts with decisions upholding against Establishment Clause attack the constitutionality of measures requiring employers and unions to accommodate in the workplace religious beliefs other than sabbath observance. *McDonald v. Ebasco International, Inc.*, 686 F.2d 34 (9th Cir. 1982); *Anderson v. General Dynamics Convair Aerospace Division*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); *Towley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1982); *Nottingham v. Smith Steel Workers*, 643 F.2d 443 (7th Cir.), cert. denied, 454 U.S. 1046 (1982); *Jordan v. North Carolina Nat'l Bank*, 889 F. Supp. 172 (W.D.N.C. 1993), rev'd on other grounds, 905 F.2d 77 (4th Cir. 1997).¹¹

The disparity between the decision below and the decisions of courts outside Connecticut is most visible in cases involving factual situations almost identical to that presented in this case. For example, in *Rankine v. Commission on Professional Competence*, 24 Cal.3d 387, 580 P.2d 852,

¹⁰In each of the cases cited in text, the respective court upheld against Establishment Clause attack a measure requiring an employer to accommodate a sabbath observer's request not to work on his or her sabbath or other religious holiday.

¹¹While *McDonald*, *Anderson*, *Towley*, and *Nottingham* do not involve a sabbath observer's request not to work on his or her sabbath or other religious holiday, in each of them, the court upheld against an Establishment Clause challenge the right of the government to require employers and unions to accommodate the religious beliefs of employees. While not factually identical to the instant case, these cases would seem to be conceptually indistinguishable. Indeed, the *Nottingham* court held that it was bound by this Court's contrary decision of the appeal in *Rankine* (a case upholding a measure identical to that struck down by the decision below) and rejected the union's attempt to distinguish the case. 643 F.2d at 443.

134 Cal. Rptr. 907 (1979), appeal dismissed for want of a substantial federal question, 644 U.S. 896 (1980), a Sabbathist was discharged for refusing to work on Saturdays and religious holidays. The California Supreme Court, relying on a state provision forbidding religious discrimination in employment, held that the employer was required to provide unpaid leave for religious holidays if it could do so without undue cost. The court rejected the argument that the accommodation contravened the Establishment Clause. Applying the same three-part test used by the Connecticut Supreme Court in the case below, the California court found it "clear" that the purpose and primary effect of imposing a duty of accommodation "are not to favor any religion but [are] to promote equal employment opportunities for members of all religious faiths." 134 Cal. Rptr. at 914. The court saw no entanglement problem. Id., 893 F.2d at 898; 134 Cal. Rptr. at 914. The court saw no entanglement problem. Id., 893 F.2d at 898; 134 Cal. Rptr. at 914. It concluded:

[T]he reasonable accommodation [of the employer's] religious observances required by [California] does not necessitate expenditure of money or preference of one religion over another. On the contrary, the effect of the accommodation is simply to lessen the discrepancy between the conditions imposed on [the employer's] religious observances and those enjoyed, say, for observances by adherents of majority religions as a result of the five-day week and the Christmas and Easter vacations or regular school calendar.

M., 893 F.2d at 898; 134 Cal. Rptr. at 914.

In *Kentucky Commission on Human Rights v. Kress Bakery*, *Inv.*, 644 S.W.2d 230 (Ky. Ct. App. 1980), cert. denied, 812 S.W.2d 233 (1981), a sabbath observer refused

to work on Sundays, notwithstanding his employer's practice (common in the industry) of giving only Tuesdays and Saturdays off. When he was discharged, he brought suit under Kentucky's religious accommodation provisions. Ky. Rev. Stat. §§344.030(5), 344.040(1). The Kentucky Court of Appeals held that the statute required the company to accommodate the religious beliefs of the employee. Applying the same three-part test used by the Connecticut court in the case below, it expressly rejected the employer's claim that the statute violated the Establishment Clause. In the Kentucky court's view, the secular purpose of the accommodation provisions was "to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon one of the precepts of his religion in order to accept work"; by adopting it, "the Legislature merely promote[d] equal employment opportunities for members of all religious faiths." 644 S.W.2d at 253. The primary effect of the provisions was not to advance religion because it "in no way offer(ed) sponsorship, financial support, or active involvement to any religious activity" and "accrue(d) to individuals and not to any religious organization." Id. Finally, the provisions did not involve an excessive entanglement of government in religion because "[t]he Legislature's interest here in religion is only for the purpose of outlawing religious discrimination in employment" and that "certainly cannot be interpreted as 'excessive entanglement' in any sense of the words." Id.¹⁰

Finally, in *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981), a Seventh-

¹⁰Several states have provisions that impose upon employers a duty to accommodate the religious beliefs of employees. N.Y. Exec. Law §296(10) (Consol. 1982) (explicitly accommodating sabbath observers); Va. Code §40.1-28.3 (explicitly accommodating sabbath observers); Pa. Stat. Ann. Tit. 43, §955.1 (explicitly accommodating sabbath observers who are public employees). See also Alaska Stat. §18.80.200; Ariz. Rev. Stat.

Day Adventist became convinced that his religion forbade him to pay dues to a labor organization. Therefore, after seventeen years as a dues-paying union member, he informed the union that he would no longer pay his dues to them—but instead would pay an equivalent sum of money to the American Cancer Society. The union refused the requested accommodation and notified Nottelson that, if he did not pay his dues to the union, he would be discharged under the union security clause in the union's contract. Eventually, Nottelson was fired and, invoking the religious accommodation provisions of Title VII, brought suit against his employer and the union.

Both the district court and the court of appeals found for Nottelson, rejecting the defendants' claim that the religious accommodation provision violated the Establishment Clause. The Seventh Circuit relied in part on this Court's summary affirmation of *Rankins*, *supra*. It acknowledged that *Rankins* (which, like the instant case, dealt with a sabbath observer's request not to work on his sabbath) was not factually identical to the case before it, but found that factual difference "a distinction without substance." 643 F.2d at 453.

Then, assuming *arguendo* that *Rankins* did not control the case before it, the Nottelson court went on to apply the

Ann. §§41-1461(6), 41-1463(B)(1); Mass. Gen. Laws Ann. ch. 151B, §4(1)(A); N.H. Rev. Stat. Ann. §§354-A:3(4), 354-A:8(1); S.C. Code Ann. §1-13-30(k); Texas Commission on Human Rights Act (1983), H.B. 14, §§2.01(13), 5.01(1); Wis. Stat. Ann. §1111.337. These laws impose (some by explicit language and others by judicial interpretation) a duty to accommodate the religious beliefs of an employee, such as Mr. Thornton, whose religion forbids him or her to work on a certain day. New York's religious accommodation provision (which is nearly identical in scope to Connecticut's §§3-303e) is set out fully in Appendix D.

same three-part *Nyquist* test used by the Connecticut Supreme Court in the instant case and found Title VII's accommodation provision constitutionally acceptable. In the court's view, the purpose of the accommodation provision was clearly secular—"to protect the employment opportunities not only of the victims of overt discrimination but also of individuals who are unintentionally discriminated against because their religious convictions are not reflected in facially neutral majoritarian rules." 643 F.2d at 454. The Seventh Circuit also concluded that the accommodation provision did not "have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another." *Id.* In the court's view, the provision did "not confer a benefit on those accommodated, but rather relieve(d) those individuals of a special burden that others [did] not suffer . . ." *Id.* Finally, the Nottelson court concluded that the accommodation provision of Title VII did not foster an excessive government entanglement with religion, since the statute required the government

only to determine whether a belief is "religious" within the meaning of the statute . . . and whether it is sincerely held, a question of credibility. This is essentially the same determination required in implementing the conscientious objector exemption under the selective service statutes . . .

Id. at 455.

Based upon what amounts to a point-by-point refutation of the reasoning in the Connecticut Supreme Court's decision in the instant case, the Nottelson court held that the accommodation provisions of Title VII—which it found identical to provisions mandating accommodation of a sabbath observer's request not to work on his or her sabbath—did not violate the Establishment Clause of the First Amendment.

IV.**CONCLUSION**

The Connecticut Supreme Court erred when it assumed the validity of §53-303e by woodenly applying the tripartite Nyquist test without regard to the decisions of this Court defining the permissible scope of governmental accommodation of religion. As it happens, however, proper application of the Nyquist test, see Section III *supra*, yields precisely the same result as does consideration of those cases—in this case, a conclusion that §53-303e is constitutional. This is because there is an underlying unity to this Court's church and state decisions: The sensitive application of the Nyquist test inevitably leads to the same result as does application of this Court's decisions on accommodation, for it is consistent with the benign neutrality mandated by the Religion Clauses to permit government to lighten genuine burdens placed upon religious persons by facially neutral rules.

For the reasons given, the decision of the Supreme Court of the State of Connecticut should be reversed.

Respectfully submitted,

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*Counsel for the intervenor gratefully acknowledges the assistance of Richard B. Bernstein, Esq., and Jonathan H. Hurwitz, a second-year student at New York University Law School, both of whom aided in the preparation of this brief.

In the Supreme Court of the United States

October Term, 1962

Brown v. Donald E. Thornton, Petitioner,

and

State of Connecticut, Intervenor,

v.

Caesar, Inc., Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF OF INTERVENOR STATE OF CONNECTICUT

APPENDIX

APPENDIX A
THE FIRST AMENDMENT TO THE CONSTITUTION
OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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APPENDIX B

CONNECTICUT GENERAL STATUTES §53-30b

- (a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.
- (b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.
- (c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.
- (d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.
- (e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

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APPENDIX C

LEGISLATIVE HISTORY OF §53-30b

Section 53-30b was originally enacted in 1976 as part of a thorough revision of Connecticut's Sunday Statute.¹ Indeed, the section was introduced in the State General Assembly as part of an attempt to abolish completely the Sunday closing law. See Note, *An Analytical History of Connecticut Sunday Closing Legislation*, 12 Conn.L.Rev. 539, 551 n.44 (1980). Opponents of repeal feared that abolition of the Sunday closing laws would mean that pressure would be put upon employees to work in violation of conscience. Sen. Lieberman, 19 Conn. S. Proc. Part V 1976 Sess. at 2014; Sen. Alfano, id. at 2033-34.² Section 53-30b was introduced to protect employees from such pressure. Sen. Hader, 19 Conn. S. Proc. Part V 1976 Sess. at 2039-40 ("The Bill proposed, the total repeal Bill, gives people the right not to work on the Sabbath if they chose to and I think that is a responsible action on the part of the government to guarantee those who wish to observe their Sabbath, whatever day it is, not to have to work. And that's as far as government ought to go. Separation of church and state—seven days a week, including Sunday. I think that's a basic

¹The revision was prompted when the Court of Common Pleas held that the Sunday closing law then in force was unconstitutional for vagueness. *State v. Anonymous*, 53 Conn. Supp. 55, 364 A.2d 244 (C.P. 1976).

²Although Connecticut law prohibits religious discrimination in employment, Conn. Gen. Stat. §§11 et seq., it does not require employers to accommodate employees' religious practices, as does Title VII. Thus, the Legislature could reasonably fear that employees objecting on religious grounds to work on a particular day would be in danger of losing their jobs.

concept that's part of the total repeal effort that's going on."'). See also, Rep. Webber, 19 Conn. H. Proc. Part VI (1978) *Supra*, at 2425. By its terms, it protected all workers, whatever their creed, from being forced to work on their Sabbath, whatever day it might be. Once §53-30b had been added, the Connecticut's General Assembly, the lower house of the legislature, passed a bill repealing the state's Blue Law. The Senate radically altered the Assembly's bill, however, amending it to include provisions requiring most stores to close on Sunday. Nonetheless, in the process of reworking the fundamental thrust of the reform, the Senate did not disturb §53-30b. There is no legislative history indicating how or why the Senate retained §53-30b in the bill, but it did. And, it was the Senate's bill—with §53-30b intact—which ultimately became law.²

Soon after the revised Sunday closing law passed the legislature, Connecticut's Court of Common Pleas declared it unconstitutional. *State v. Anonymous*, 21 Conn. Supp. 343, 386 A.2d 200 (C.P. 1978). That court's decision dealt only with the provisions of the bill requiring Sunday closing, however, and did not discuss §53-30b or purport to hold it unconstitutional.

In 1978, the State Legislature responded to the court's ruling by enacting yet another Sunday closing law—one which once again retained §53-30b unchanged. Pub. Act No. 78-229, 1978 Conn. Pub. Acts 700-02. This time, it was the Connecticut Supreme Court that declared the statute uncon-

²Pub. Act No. 78-418, 1978 Conn. Pub. Acts 638-41, as amended by Pub. Act No. 78-438, 1978, 61, 1978 Conn. Pub. Acts 681, 701-02. See Note, *supra*, at 249-54.

stitutional. *Childs's, Inc. v. Building Barn*, 847 Conn. 294, 437 A.2d 343 (1977). But, just as the Court of Common Pleas before it, the state Supreme Court did not address the constitutionality of §53-30b, and that provision remained in effect.³

³In the proceeding below, Childs argued that since Building Barn had declared the "non action" of the state Sunday closing law invalid, §53-30b should be considered void. The court below declined to address the issue, since in its view §53-30b was invalid on its own terms. Pet. App. at 11a, n.7.

APPENDIX D

NEW YORK EXECUTIVE LAW § 87(2)(b)

- (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.
- (b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, whenever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer or such person as leave taken without pay.

JOINT APPENDIX

Office - Supreme Court, U.S.
FILED
JUN 1 1984
ALEXANDER L. STEVENS

No. 83-1158

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,

Petitioner,

and

STATE OF CONNECTICUT,

Intervenor,

v.

CALDOR, INC.,

Respondent.

On Writ Of Certiorari To The Supreme Court of Connecticut

JOINT APPENDIX

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Petition for Certiorari Filed January 11, 1984
Certiorari Granted March 5, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 247-4200

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Response of Caldor, Inc. to Thornton Grievance filed with the Connecticut Mediation and Arbitration Board (May 15, 1980)	3a
Decision of the Connecticut Board of Mediation and Arbitration (October 20, 1980)	6a
Application of Caldor, Inc. to Vacate Arbitration Award (Connecticut Superior Court) (November 18, 1980)	14a
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RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

I Connecticut Superior Court, Judicial District of Hartford-New Britain at Hartford	
November 18, 1980	Application of Caldor, Inc. to Vacate Arbitration Award
April 3, 1981	Answer of Donald E. Thornton To Plaintiff's Application to Vacate Arbitration Award and Cross-Application to Confirm Arbitration Award
May 19, 1981	Amended Cross-Application of Donald E. Thornton to Confirm Arbitration Award
May 26, 1981	Answer of Caldor, Inc. to Amended Cross-Application to Confirm Arbitration Award
August 27, 1981	Judgment of the Connecticut Superior Court
August 28, 1981	Memorandum of Decision

II. Connecticut Supreme Court

September 3, 1981 Appeal of Caldor, Inc. from
Decision and Order of
Superior Court dated
August 25, 1981, and filed
August 28, 1981

September 6, 1983 Decision of the Connecticut
Supreme Court

**[Grievance Of Donald E. Thornton Filed With the Connecticut
Mediation And Arbitration Board]**

**LABOR DEPARTMENT
CONNECTICUT STATE BOARD OF
MEDIATION AND ARBITRATION**

Case No. 7980-A-727

**EMPLOYEE
PRE-HEARING
INFORMATION**

For Board Use Only

This form is used to familiarize the panel members with the issues involved. The information submitted herein will be treated as a preliminary, general statement of the Employee's position. It will not become part of the official record of this case. Please complete and return promptly.

EMPLOYEE Donald E. Thornton

EMPLOYER Caldor, Inc.

ISSUE IN DISPUTE Section 53-303 (E) of the Ct.
General Statutes.

* * *

2a

EMPLOYEE POSITION

(State briefly your position on the issue noted above)

As a dept. manager I am unable to observe my Sab-bath.

* * *

(use other side if necessary)

(Signature) /s/ Donald E. Thornton
DONALD E. THORNTON

Type Name: Donald E. Thornton
RR #4, Unit C-5
Tapping Reeve Village
Litchfield, CT 06759

REC'D
MAY 06 1980

3a

[Response Of Caldor, Inc. To Thornton Grievance Filed With
the Connecticut Mediation And Arbitration Board]

**LABOR DEPARTMENT
CONNECTICUT STATE BOARD OF
MEDIATION AND ARBITRATION**

Case No. 7980-A-727

**EMPLOYER
PRE-HEARING
INFORMATION**

For Board Use Only

This form is used to familiarize the panel members with the issues involved. The information submitted herein will be treated as a preliminary, general statement of the Employer's position. It will not become part of the official record of this case. Please complete and return promptly.

EMPLOYER Caldor, Inc.

EMPLOYEE Donald E. Thornton SS#055-34-4338

ISSUE IN DISPUTE (Where a discharge is involved you are requested to submit the grievant's full name and Social Security number.)

Does Employee have any valid claim under Section 53-303 (e) of the Connecticut General Statutes arising out of his refusal to work on Sundays and subsequent resignation?

EMPLOYER POSITION

(State briefly your position on the issue noted above)

(See Other Side of Page)

* * *

(use other side if necessary)

(Signature) Alan S. Kuller

ALAN S. KULLER

Type Name: Alan S. Kuller

Title: Vice President & Counsel

RECD

MAY 15 1980

EMPLOYER POSITION

- 1) Mr. Thornton was not discharged. He rejected the Company's efforts to accommodate him by transferring him to another position where Sunday work was not essential, and he resigned.
- 2) Mr. Thornton's refusal to work on Sunday was not because it was his Sabbath, as that term is used in Section 53-303(e).
- 3) The core section of the General Statutes of which Section 53-303 (e) is a part, has been held unconstitutional by the Supreme Court of Connecticut. In view of the overriding importance of that core section, all the related sections, including Section 53-303(e) must be regarded as invalid.
- 4) Section 53-303 (e) is unconstitutional because it is an impermissible government entanglement with religion prohibited by both the Constitutions of the United States and the State of Connecticut.

(Decision Of the Connecticut Board Of Mediation And Arbitration)

**STATE OF CONNECTICUT
LABOR DEPARTMENT
STATE BOARD OF MEDIATION
AND ARBITRATION
ARBITRATION AWARD**

In the Matter of:
CALDOR, INC.
and
DONALD E. THORNTON

) **CASE NO. 7980-A-727**
) Award Date: October
) 20, 1980
) Hearing Date: July 14,
) 1980
) Location of Hearing:
 Labor Department
 Wethersfield, CT.

APPEARANCES:

For the Company: Alan S. Kuller, Esq.
For the Grievant: Robert L. Fisher, Esq.

ISSUE

The issues submitted by Caldor, Inc. was [sic] as follows: The ultimate issue involved in this proceeding is whether the employee has any valid claim under Section 53-303(e) of the Connecticut General Statutes arising out of his refusal to work on Sunday and his subsequent resignation? The issue submitted by the Grievant is as follows: Does the employee have any valid claim under Section 53-303 of the General Statutes arising out of his refusal to work on Sundays and termination of employ-

ment? After a hearing on the matter, the panel established the issue to be as follows: Does the employee have any valid claim under Section 53-303 of the General Statutes of the State of Connecticut arising out of his refusal to work on Sunday and termination of his employment? If so, what are his claims?

COMPANY'S POSITION

The company's positions are as follows:

1. Mr. Thornton was not discharged. He rejected the company's efforts to accommodate him by transferring him to another position where Sunday work was not essential, and he resigned.
2. Mr. Thornton's refusal to work on Sunday was not because it was his "Sabbath," as that term is used in Section 53-303(e).
3. The core section of the General Statutes of which section 53-303(e) is a part, has been held unconstitutional by the Supreme Court of Connecticut. In view of the overriding importances [sic] of the core section, all the related sections, including section 53-303(e) must be regarded as invalid.
4. Section 53-303(e) is unconstitutional because it is an impermissible governmental entanglement with religion prohibited by both the Constitution of the United States and the State of Connecticut.

GRIEVANT'S POSITION

The Grievant's positions are as follows:

1. That the Grievant was required to work on Sundays in violation of Section 53-303(e).

2. The Grievant further stated and maintained that this panel does not have the right to decide the Constitutionality of a State statute.

PERTINENT STATUTORY LAW

Section 53-303(e). More than six days employment in calendar week prohibited. Employee observance of Sabbath. Employee remedies. (a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.

(b) No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute ground for his dismissal.

(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

(e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

STATEMENT OF FACTS

The Grievant had been an employee of Caldor, Inc. for approximately 5½ years. At the time in question, he was an employee of the Torrington Caldor Store, having been transferred there in early October, 1978. At the time of his termination, the Grievant was manager of the men's, boys and shoe department and was being paid at the hourly rate of \$6.46. The Grievant had, during 1977, 1978 and 1979 worked on Sundays. This Sunday employment was a requirement for all managers of Caldor, Inc. The Sunday employment was necessitated by the opening of Caldor, Inc., on Sundays. In late 1979, the Grievant informed his employer that he would no longer be working Sundays as it was his Sabbath. The company at this time offered to transfer the Grievant to a store in Massachusetts at the same rate of pay and the same supervisory capacity. The transfer was offered to the Grievant because stores operating in Massachusetts were not opened on Sundays and he was not, therefore, caused to work on Sundays. The Grievant refused the transfer. In March, 1980, the Grievant was told by a supervisor of the Caldor stores that he would be required to work on Sundays and if he would not work on Sundays, the store would have no alternative then (sic) to demote him to a position of rank and file which would mean a cut in pay to \$3.50 per hour from the pay he was making which was \$6.46 per hour.

BOARD'S POSITION

The Board of Mediation and Arbitration acts in a quasi judicial manner and as such is not empowered to decide the constitutionality of a statute of the State of Connecticut. It therefore assumes the statutes to be constitutional and shall do so until a Court of last resort states otherwise. This panel, then, shall accept the constitutionality of Section 53-303(e) of the General Statutes

of the State of Connecticut and will not, therefore, discuss or comment on the portions of the arguments of the parties concerning the constitutionality of the Section. Assuming the constitutionality of Section 53-303(e), the panel must then look to see if the statute has been violated. It is obvious that the employees of Caldor acting in a management capacity were required as part of their duties to work on some Sundays. This point was testified to by all witnesses at the hearing. The Grievant had, in fact, during the years 1977, 1978 and 1979 worked many Sundays. Subsequent to September, 1979 the Grievant at different times, switched his Sunday hours with other employees and finally, in March, 1980, he stated to Mr. Ranucci, the company's supervisor, that he would no longer work on Sundays. Prior to this date, the company, through its officials, had many conversations and meetings with the Grievant. During one of these meetings, the Grievant was offered the transfer to a store in Massachusetts, a state where company stores are not operated on Sundays, but for personal reasons, the Grievant declined the transfer. The testimony established that company policy dictated that transfers of this nature were by mutual consent of the company and the employee offered the transfer. If the employee to be transferred declined the transfer, it was not made. The offer of a transfer to the Grievant, therefore, was just an offer and not a company order. If the Grievant wished to transfer, he could do so or if he wished to stay in the store [where] he was employed, he could stay in the store. The Grievant chose to remain where he was. Mr. Thornton testified that Sunday was his Sabbath. He testified to some extent as to what he would do and would not do as an observance of his Sabbath. The panel felt that Mr. Thornton had justified to the panel, that, in fact, his Sundays were his day of Sabbath. On March 6, 1980, Mr. Ranucci was told by the

Grievant that he would no longer work Sunday hours. Mr. Ranucci then told the Grievant "Well, I have no alternative other than to revert you back to a rank and file at \$3.50 per hour beginning this Monday." (Company Exhibit B). The Grievant then stated to Mr. Ranucci that he would sever his relationships with the Caldor company effective Saturday, March 8, 1980. It is noted by the panel that Mr. Thornton's refusal to accept a rank and file position was subsequent to his discharge as a management employee. Thereafter the Grievant appealed his fate to this Board. Was the act of Mr. Ranucci a discharge of Mr. Thornton as an employee of Caldor or did Mr. Thornton resign as an employee of Caldor? If a discharge for refusal to work Sunday hours occurred and Sunday was the Grievant's Sabbath, said act violated Sec' n 53-303(e) of the Connecticut General Statutes. As a resignation occurred and said resignation was voluntary, no violation of Section 53-303(e) was committed. A change in Mr. Thornton's employment with Caldor was to occur on March 11, 1980. He was to lose his managerial status and become one of the "rank and file." He was being discharged as a management employee. Mr. Thornton's position at a salary of approximately \$6.50 per hour was being changed to a position at a salary of \$3.50 per hour. His position of an employee of the management team of Caldor was being terminated. This change was being made by Caldor because of Mr. Thornton's refusal to work Sundays. True, he could remain an employee of Caldor but not in the position he was then holding. He had not been discharged as an employee of Caldor, as such, but rather as a management employee of Caldor. Mr. Thornton refused the demotion and resigned as a member of the "rank and file." Mr. Thornton informed Mr. Ranucci that he would complete his duties as a management employee as of March 9, 1980 but would not accept the

position in "rank and file" which was to start March 11, 1980. Mr. Thornton did not resign as a management employee. He wished to continue in his position but was told this would not be possible if he did not agree to work Sundays. In the opinion of the majority of the panel, Caldor discharged Mr. Thornton as a management employee for refusing to work Sundays, which day was Mr. Thornton's day of Sabbath. Therefore, Caldor violated Section 53-303(e) of the General Statutes of the State of Connecticut. To hold otherwise would allow an employer to avoid the provisions of section 53-303(e) by demoting an employee who refused to work on his Sabbath forcing the employee to accept a substantial reduction in pay. The employee would then have to accept this situation or resign. In either case, he would have no access to Section 53-303(e). This, in the opinion of the majority of the panel is absurd. In the case before us, the majority of the panel felt that the resignation of Mr. Thornton was: 1. An involuntary resignation of a new position which was offered to him by Caldor, Inc. after Caldor, Inc. had discharged him from his capacity as a manager of their store department. The act of discharging Mr. Thornton from his managerial position because of his refusal to work on his Sabbath was a violation of Section 53-303(e) of the General Statutes of the State of Connecticut. What happened thereafter does not mitigate or change the violation of the statute by Caldor, Inc.

AWARD

The grievance is sustained and Caldor, Inc. is ordered to reinstate the Grievant, Donald E. Thornton to the position he held on March 9, 1980 with Caldor, Inc., to reimburse him for all lost pay and fringe benefit which he would have earned from said date to the date of his reinstatement, less any unemployment compensation or

other compensation Donald E. Thornton was paid or earned during said period of time.

CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION

/s/ Thomas J. Staley

THOMAS J. STALEY
Public Member

/s/ Raymond Shea

RAYMOND SHEA
Labor Member

/s/ George McDonough (Dissenting)

GEORGE McDONOUGH
Management Member

**[Application Of Caldor, Inc. To Vacate Arbitration Award
(Superior Court)]**

[No. 252522 CALDOR, INC. v. DONALD E. THORNTON]) SUPERIOR COURT) JUDICIAL DISTRICT) OF HARTFORD/) NEW BRITAIN) AT HARTFORD) NOVEMBER 10, 1980]
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**TO THE SUPERIOR COURT WITHIN AND FOR THE
JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT
HARTFORD, NOW IN SESSION, COME(S) CALDOR, INC.,
OF NORWALK, CONNECTICUT, THE PLAINTIFF,
SEEKING AN ORDER VACATING A CERTAIN
ARBITRATION AWARD INVOLVING MATTERS BETWEEN
THE PLAINTIFF AND DONALD E. THORNTON, THE
DEFENDANT, AND COMPLAINS AND SAYS:**

1. On July 14, 1980, the Plaintiff and Defendant appeared before an arbitration hearing held by the State Board of Mediation and Arbitration, (hereinafter referred to as the Board) pursuant to C.G.S. 53-303(e).
2. On October 20, 1980, the Board mailed a written arbitration award, a copy of which is annexed hereto, as Exhibit "A".
3. The Petitioner seeks to vacate the Board's award because said award is illegal and improper, and beyond the power of the arbitrators for the following reasons:

a) The award is in violation of the constitutional provisions prohibiting governmental entanglement with religion and governmental establishment of religion as enunciated in the First Amendment, United States Constitution and Article 7 of the Connecticut Constitution;

- b) the award is contrary to and in violation of the statutory provisions of C.G.S., 53-303, which applies only to "discharges of employment";
- c) the award is invalid as a matter of law because C.G.S. 53-303(e) is part of a statutory scheme recognizing the "Sabbath," and the Statutory scheme has been declared unconstitutional;
- d) the award is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
- e) the award is affected by the Board's decision that the defendant was "discharged" which is an error of law;
- f) the award is arbitrary, capricious and is a clearly unwarranted exercise of discretion.

WHEREFORE, the plaintiff prays:

1. That the award be vacated.
2. That an order be issued directing the defendant to appear on a day certain to show cause, if any there be, why this application should not be granted.
3. That an order be entered staying any proceedings by the defendant to enforce the award pending final disposition of this application.

Dated at Hartford, Connecticut this 10th day of November, 1980.

PLAINTIFF

By /s/ Eliot B. Gersten
ELIOT B. GERSTEN
Gersten & Gersten
234 Pearl Street
Hartford, CT 06130

[Answer of Donald E. Thornton To Plaintiff's Application To Vacate Arbitration Award and Cross-Application To Confirm Arbitration Award (Connecticut Superior Court)]

No. 252522	SUPERIOR COURT
CALDOR, INC.	JUDICIAL DISTRICT
v.	OF HARTFORD/
DONALD E. THORNTON	NEW BRITAIN
	AT HARTFORD
	APRIL 1, 1981

ANSWER TO PLAINTIFF'S APPLICATION TO VACATE ARBITRATION AWARD

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. The Defendant denies that the Board's award is illegal or improper or beyond the power of arbitrators. The Defendant further denies all of the allegations set forth in subparagraphs a) through f).

CROSS-APPLICATION TO CONFIRM ARBITRATION AWARD

To the Superior Court within and for the Judicial District of Hartford/New Britain, at Hartford, comes Donald E. Thornton, the Defendant, seeking an order confirming a certain arbitration award involving matters between the Plaintiff, Caldor, Inc. and the Defendant, who complains and says:

1. That on or about April 1, 1980, pursuant to Section 53-303(e) of the Connecticut General Statutes, the Defendant, Donald E. Thornton, requested arbitration of a dispute with his employer, Caldor, Inc.

2. That on July 14, 1980, the State Board of Mediation and Arbitration of the Labor Department of the State of Connecticut held an arbitration proceeding, at which proceeding the Plaintiff and the Defendant appeared and presented their respective positions to the Arbitration Panel.

3. That following the arbitration proceeding, the parties submitted written briefs. The Defendant, Donald E. Thornton, sought by way of relief, reinstatement to his former position as Department Manager at a salary level at least equal to that at the time of his termination, reimbursement from his employer of all pay to which he would have been entitled between his termination date and his reinstatement date, and an award of counsel fees and punitive damages against the employer.

4. That on October 20, 1980, the Arbitration Panel rendered its award in favor of the Defendant, Donald E. Thornton, having found that the employer had discharged Mr. Thornton because of his refusal to work on his Sabbath, in violation of Section 53-303(e) of the Connecticut General Statutes. The Arbitration Panel ordered Caldor, Inc. to reinstate Mr. Thornton to his prior position and to reimburse him for all loss [sic] pay and fringe benefits, less any unemployment compensation or other compensation paid or earned in the intervening period.

5. That on November 10, 1980, the Plaintiff, Caldor, Inc., filed an Application to Vacate the Arbitrator's Award, pursuant to Section 52-418 of the Connecticut General Statutes.

WHEREFORE, the Defendant prays:

1. That the award of the arbitrators be confirmed, pursuant to Section 52-417 of the Connecticut General Statutes.

2. That the Court order twice the full amount of the wages to which the Defendant is entitled, plus costs and reasonable attorney's fees, pursuant to Section 31-72 of the Connecticut General Statutes.

DEFENDANT

By /s/ Robert L. Fisher, Jr.

ROBERT L. FISHER, JR. for
Cramer & Anderson
South Street
Litchfield, CT 06759
JN 12732 Tel. 567-8717
His Attorney

[Certification omitted in printing]

[Filed April 3, 1981]

(Amended Cross-Application Of Donald E. Thornton To
Confirm Arbitration Award (Connecticut Superior Court))

No. 252522	) SUPERIOR COURT
CALDOR, INC.	) JUDICIAL DISTRICT
v.	) OF HARTFORD/
DONALD E. THORNTON	) NEW BRITAIN
	) AT HARTFORD
	MAY 12, 1981

**AMENDED CROSS-APPLICATION TO CONFIRM
ARBITRATION AWARD**

To the Superior Court within and for the Judicial District of Hartford/New Britain, at Hartford, comes Donald E. Thornton, the Defendant, seeking an order confirming a certain arbitration award involving matters between the Plaintiff, Caldor, Inc., and the Defendant, who complains and says:

1. That on or about April 1, 1980, pursuant to Section 53-303(e) of the Connecticut General Statutes, the Defendant, Donald E. Thornton, requested arbitration of a dispute with his employer, Caldor, Inc.
2. That on July 14, 1980, the State Board of Mediation and Arbitration of the Labor Department of the State of Connecticut held an arbitration proceeding, at which proceeding the Plaintiff and the Defendant appeared and presented their respective positions to the Arbitration Panel.
3. That following the arbitration proceeding, the parties submitted written briefs. The Defendant, Donald E. Thornton, sought by way of relief, reinstatement to his former position as Department Manager at a salary level at least equal to that at the time of his termination,

reimbursement from his employer of all pay to which he would have been entitled between his termination date and his reinstatement date, and an award of counsel fees and punitive damages against the employer.

4. That on October 20, 1980, the Arbitration Panel rendered its award in favor of the Defendant, Donald E. Thornton, having found that the employer had discharged Mr. Thornton because of his refusal to work on his Sabbath, in violation of Section 53-303(e) of the Connecticut General Statutes. The Arbitration Panel ordered Caldor, Inc. to reinstate Mr. Thornton to his prior position and to reimburse him for all loss [sic] pay and fringe benefits, less any unemployment compensation or other compensation paid or earned in the intervening period.

5. That on November 10, 1980, the Plaintiff, Caldor, Inc., filed an Application to Vacate the Arbitrator's Award, pursuant to Section 52-418 of the Connecticut General Statutes.

WHEREFORE, the Defendant prays:

1. That the award of the arbitrators be confirmed, pursuant to Section 52-417 of the Connecticut General Statutes.

DEFENDANT

By /s/ Robert L. Fisher, Jr.
 ROBERT L. FISHER, JR.
 Cramer & Anderson
 South Street
 Litchfield, CT 06759

[Filed May 19, 1981]

[Certification omitted in printing]

[Answer Of Caldor, Inc. To Amended Cross-Application To Confirm Arbitration Award (Connecticut Superior Court)]

No. 252522	) SUPERIOR COURT
CALDOR, INC.	) JUDICIAL DISTRICT
v.	) OF HARTFORD/
DONALD E. THORNTON	) NEW BRITAIN
	) AT HARTFORD

May 20, 1981

**ANSWER TO AMENDED CROSS-APPLICATION TO
CONFIRM ARBITRATION AWARD**

1. As to paragraph 1, plaintiff Caldor, Inc. has insufficient knowledge and leaves the defendant to his proof thereof.
2. Paragraphs 2 and 5 are admitted by the plaintiff, Caldor, Inc.
3. Paragraphs 3 and 4 are neither admitted nor denied as the written briefs submitted by the parties and award rendered by the arbitration panel referred to therein, speak for themselves.

PLAINTIFF

By /s/ Eliot B. Gersten
 ELIOT B. GERSTEN
 Gersten & Gersten
 234 Pearl Street
 Hartford, CT 06130

[Filed May 26, 1981]

[Judgment of the Connecticut Superior Court]

STATE OF CONNECTICUT

252522 CALDOR, INC. a New York corporation doing business in Connecticut v. DONALD E. THORNTON of Litchfield, Connecticut) SUPERIOR COURT) JUDICIAL DISTRICT) OF HARTFORD/) NEW BRITAIN) AT HARTFORD) August 25, 1981)
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PRESENT: HON. JOHN D. BRENNAN, JUDGE

JUDGMENT

This action, in the nature of an application to vacate an award by arbitrators which found the Plaintiff's discharge of the Defendant for his refusal to work on Sunday, his Sabbath, violated Connecticut General Statute Section 53-303(e), claiming that said award violates the First Amendment of the United States Constitution, Article Seven of the Connecticut Constitution, and Connecticut General Statutes Section 53-303, is erroneous as regards the whole record, and is an error of law and arbitrary, capricious and an unwarranted exercise of discretion, came to this Court on November 18, 1980, and thence to May 19, 1981 when the Defendant filed an amended cross application to confirm arbitration award, and thence to the present time when the parties appeared and were fully heard.

The Court finds that Connecticut General Statutes Section 53-303(e) does not violate the Establishment Clause

of the First Amendment of the United States Constitution.

The Court further finds that the Court can review a decision of the State Board of Mediation and Arbitration, and upon such review has confirmed the award because the arbitrators were correct in finding that the Defendant Thornton had been discharged from his position of employment.

The court further finds that the Plaintiff Caldor did not waive its objection to Connecticut General Statutes Section 53-303(e) on constitutional grounds by its participation and submission to arbitration of the Defendant's claim under said statute since it presented the objection and issue before said Board of Mediation and Arbitration and vigorously protested the validity of the statute on said constitutional grounds.

WHEREUPON, it is adjudged that the application for an order vacating the arbitration award is denied and the cross-application for an order confirming the award is granted.

By the Court

/s/ JoAnne Doyle
JOANNE DOYLE
Assistant Clerk

[Filed August 27, 1981]

[Appeal Of Caldor, Inc. To The Connecticut Supreme Court
From Superior Court Decision]

[No. 252522	) SUPERIOR COURT
CALDOR, INC.	) JUDICIAL DISTRICT
v.	) OF HARTFORD/
DONALD E. THORNTON	) NEW BRITAIN
	) AT HARTFORD
	) September 2, 1981]

APPEAL

In the above entitled action the plaintiff Caldor, Inc. hereby appeals to the Supreme Court from Decision and Order, Dated Aug. 25, 1981 and filed Aug. 28, 1981.

By /s/ Eliot B. Gersten

ELIOT B. GERSTEN
Gersten & Gersten
234 Pearl Street
Hartford, CT 06103

(Filed September 3, 1981)

Transcript of Proceedings Before Correctional Board of
Mediation and Arbitration (July 14, 1980)

**STATE OF CONNECTICUT
LABOR DEPARTMENT
BOARD OF MEDIATION
AND ARBITRATION**

A Hearing in the
Matter of

CALDOR, INC.
and
DONALD E. THORNTON

: No. 7880-A-727

: Board Hearing Room
Labor Department
200 Follybrook Drive
Wethersfield, Connecticut

July 14, 1980
11:25 a.m.

The Panel of Arbitrators

THOMAS J. STALEY, Chairman
RAYMOND SHEA, Labor Member
GEORGE McDONOUGH, Management Member

[2] Appearances:

Representing Calder, Inc.

ALAN S. KULLER, Esq.
Vice President-Counsel
20 Glover Avenue
Norwalk, Connecticut 06852

Representing Mr. Thornton

CRANE & ANDERSON
South Street
Litchfield, Connecticut 06759

By: ROBERT L. FISHER, Esq., of Counsel

[3] THE CHAIRMAN: Gentlemen, have we agreed on the issue?

MR. KULLER: Well, the employer has stated his position in the form submitted to the Board, and I think that that fairly reflects the issue.

I received a letter from counsel for Mr. Thornton. We seem to agree that the issue as presented in the employer's position is the issue or the issues, I should say.

THE CHAIRMAN: What letter are you referring to, Mr. Kuller?

MR. KULLER: I have received a letter from counsel for Mr. Thornton dated June 30, 1980. I had assumed a copy had been sent to the Board.

MR. FISHER: I'm not sure that it had. It doesn't appear on my copy that it was, but I'm not in disagreement with your statement. An earlier communication says, does the employee have a valid claim under Section 53—excuse me, 53-303(e) of the General Statutes arising out of his refusal to work and subsequent resignation.

I'll take issue with the resignation part of it, [4] but I think perhaps we can clarify that today.

Does the employee have a valid claim under the statute in question. I think that is a fair statement of the issue.

THE CHAIRMAN: Is that agree to?

MR. KULLER: Yes, I think.

THE CHAIRMAN: In other words, we can state that the issue is, does an employee or, pardon me, let's change that to read, does Donald E. Thornton have a valid claim under Section 53-303(e) of the Connecticut General Statutes arising out of his refusal to work on Sundays?

Now your argument is with the last three words, is that right, Mr. Fisher?

MR. FISHER: Well, Mr. Chairman, there was a termination of employment and I don't want to characterize that as a resignation.

THE CHAIRMAN: I can appreciate that. The problem I have, gentlemen, is this. If there is a stipulated issue I can accept it as a stipulated issue and we will hear the matter on that issue. If there is no stipulated issue, both sides are at [5] liberty to present to the panel what they feel this issue is and then the panel will decide what the issue is.

All I am trying to point out is the mechanism, whether we have a stipulated issue or we don't have a stipulated issue.

MR. FISHER: Can we substitute "termination of employment" for your word "resignation"?

MR. KULLER: Why don't we delete the "and subsequent resignation"?

MR. FISHER: I would rather have the "termination of employment" in there.

THE CHAIRMAN: Whatever you gentlemen want is all right with me.

MR. KULLER: Frankly, I see no reason to have a stipulated position. Why don't we go on the basis that you referred to before?

THE CHAIRMAN: All right. Mr. Kuller, would you state for the record what your feeling is as to the issue?

MR. KULLER: Yes, sir. It is the employer's position that the issue in this case is as set forth [6] in our previous hearing information statement, which I will read from as follows:

The issue in dispute is, does the employee have any valid claim under section 53-303(e) of the Connecticut General Statutes arising out of his refusal to work on Sundays and subsequent resignation?

Do you want the position set forth?

THE CHAIRMAN: No, that's all at this point.

MR. FISHER: Do you want to state for the record what you feel the issue is on behalf of the employee?

MR. FISHER: Mr. Chairman, the only change that I would make in the employer's statement of the issue is deleting "resignation" and substituting "termination of employment."

THE CHAIRMAN: All right. Substitute "termination of employment?"

MR. FISHER: Yes, sir.

THE CHAIRMAN: All right, Mr. Kuller, would you like to make an opening comment as to the company's position?

MR. KULLER: Yes, your Honor.

In the pre-information statement, Caldor, the [7] employer, stated the reasons why it believes Mr. Thornton's claim is invalid. And I will read them for the record.

First, Mr. Thornton was not discharged. He rejected the company's efforts to accommodate him by transferring him to another position where Sunday work was not essential, and he resigned. And now I should like to add to that that in addition he had been earlier offered a transfer to a similar position which he then held to a store in Massachusetts where the problem of Sunday work would not arise, because in Massachusetts, unlike Connecticut, the basic Sunday closing law has been upheld by the Court and in fact most retail stores, including Caldor's in Massachusetts are closed on Sundays except for the period during the Christmas holiday season where the statute specifically permits the stores to be open.

Second, Mr. Thornton's refusal to work on Sunday was not because of the sabbath as that term is used in Section 53-303(e). The record will show that Mr. Thornton worked as other department managers [8] in the Caldor stores did in 1977, 1978 and until about the middle of 1979. In fact, I believe he worked about ten Sundays in 1977, fourteen in 1978, and ten through September of 1979.

Third, the core section in the General Statutes in which Section 53-303(e) is but a part, has been held unconstitutional by the Supreme Court of Connecticut. In view of the overriding importance of that core section, all related sections, including Section 53-303(e) must be regarded as invalid.

We believe the Connecticut cases support that position. We cannot believe that the Connecticut legislature in its wisdom would in effect repeal the substantive Sunday closing provision thus allowing all retail stores to operate on Sunday in Connecticut and at the same time

pass a law saying that none of the employees have to show up for work and that there isn't anything we can do about it.

Finally, we say that Section 53-303(e) is unconstitutional on its face because it is an impermissible governmental entanglement with religion [9] which is prohibited by the Constitution of the United States and the State of Connecticut.

I would like to point out that in addition to the First Amendment of the United States Constitution, as you very well know, we have an even more affirmative provision of the Connecticut Constitution which I will give the citation to that if I can find it. That is Article 7 of the Connecticut Constitution which in its second paragraph says: "No preference shall be given by law to any religious society or denomination in the State."

It goes on with other provisions, but in essence to the extent that Section 53-303(e) is still on the statute books, it simply gives a preference to certain people. And according to the employees' counsel, that is an absolute preference to which there is simply no defense.

We say that such a state statute is unconstitutional on its face. As a matter of fact, I would call attention to the very recent decision, summarizing cases under the Civil Rights Act and which of course Connecticut's version is the Connecticut Fair [10] Employment Practices Act, which indicates that even accommodation statutes are highly suspect, and in the most recent case it holds that even Title VII accommodation provisions are unconstitutional even though they contain provisions which provide that the employer does not have to give preference which will cause any hardship.

Here we have a statute which provides absolutely no defense for the employer, and it says that he must abso-

lutely give preference to an employee who simply claims that he claims Sunday is his sabbath. We say that such a statute would be unconstitutional.

And, finally, we should point out in this connection that this does not leave the employee without protection under our laws. We have the State Fair Employment Practices Act that I mentioned. We have the federal Title VII law. And to the extent that this claim would be legitimate under those statutes there are expert agencies available to deal with any claim of discrimination, religious discrimination, so that whether or not the statute [11] was on the books, Mr. Thornton would have an expert agency both federal and state to go to if he had a claim of discrimination.

To the extent he has a demand for preference, then I think all the agencies and I hope that this board will hold that he has no right, an absolute preference that can be recognized under the Constitution of the State of Connecticut or the United States. But I should like to point out that whatever constitutional questions arise in this area that the courts have pointed out that if there is another way to decide that case that should be taken first. And I say that in this situation there may be another way to decide this case of the statute, and because it does at least go to the limits of constitutional power, it should be and also the appeal statute should be strictly construed. The statute says that a man should not be discharged and I think the record will show that Mr. Thornton was not discharged. He elected to resign rather than accept a so-called rank and file job rather than a supervisory job that he held before to which we say the statute [12] does not deal with that question. And to the extent that that question can't be dealt with, the proper remedy is under the State or Federal Fair Employment Practices Laws and not under Section 303(e).

THE CHAIRMAN: Thank you, Mr. Kuller.

MR. FISHER: would you like to make a comment now or would you like to hold the matter until you begin presenting your case?

MR. FISHER: I think, Mr. Chairman, that making a statement now would probably be repeated later on in the final summary, so if I may reserve my right at that time we might as well do it that way.

THE CHAIRMAN: Gentlemen, I'm going to rule that in this matter that this is in the form of a disciplinary matter and therefore I am going to rule that the company should proceed first.

Mr. Kuller, do you want to begin presenting your witnesses?

MR. KULLER: Yes, sir. I have a list of the employer witnesses.

THE CHAIRMAN: Thank you.

MR. KULLER: I will call Robert Gallicchio.

[13] ROBERT GALLICCHIO, called as a witness, having been first duly sworn by the Chairman, was examined and testified as follows:

THE CHAIRMAN: State your name for the record.

THE WITNESS: Robert Gallicchio, G-A-L-L-I-C-H-I-O.

THE CHAIRMAN: And your address?

THE WITNESS: 70 Webster Court, Newington, Connecticut.

THE CHAIRMAN: All right Mr. Kuller.

DIRECT EXAMINATION BY MR. KULLER:

Q Mr. Gallicchio, were you employed at the Caldor store in Torrington [sic], Connecticut, in September, 1979?

A I was.

Q What was your capacity?

A I was the store manager at the time. I had just got to the Torrington Store in September.

Q Where had you been employed previously?

A I was employed as the store manager in the Waterbury store.

Q For how long?

A From the beginning of July till September.

[14] Q And before that?

A Before that I was in the West Hartford store from about March till that July.

Q Prior to September, 1979, how many years had you been employed by Caldor?

A About six years.

Q In what general capacity?

A Store manager.

Q How long were you employed at the Torrington store?

A From September, September '79, to May '80.

Q Where did you go subsequently?

A I went to Enfield, the Enfield Caldor.

Q As store manager?

A Yes.

Q And subsequent to that?

A Right now I am in the Manchester store.

Q Again, as store manager?

A As store manager.

Q When did you first have any contact with Mr. Thornton?

A The first contact was in September of '79 when I got to the Torrington store, the first time I ever encountered Mr. Thornton.

[15] Q When was the first time while you were in there that you heard of a problem about Sunday with Mr. Thornton?

A It had to be early November when the problem was brought to my attention by one of the department managers who stated that Mr. Thornton had switched Sundays with her and it was now his Sunday to work and he had refused to work.

At that point I told her I would look into the matter, and not knowing what the whole situation was I just really never bothered to look into it fully.

Q All right. When was the next time that you heard anything about Mr. Thornton and Sunday?

A It had to be about three or four weeks later when we happened to be scheduled to work the same Sunday. We were working four department managers and Mr. Thornton never showed up.

Q You say you were scheduled to work. How was the Sunday scheduling working at that time?

A Well, the Sunday scheduling for department managers was they work generally one out of four Sundays, and we schedule them that way so that 15 of them don't

show up on one Sunday and none on the rest of the Sundays.

Q How about the store managers, how often did they—

[16] A Once every three Sundays.

Q Now going back to the statements you made before, you said he didn't show up one Sunday?

A Right.

Q What happened then?

A The next morning when he came in I approached him and asked him what had happened. Why he wasn't there. Why he hadn't shown up.

He related to me that he wasn't going to work Sundays any longer, and that he had a letter from his lawyer to that effect, at which case he was sent home to get the letter and when he came back he told me about how unfair it was, and this goes back a while, that he was scheduled to work on a Sunday. And he called in sick on that Sunday and he didn't get paid for it. And therefore he wasn't going to work any more on Sundays.

He gave me the letter at which time I called up the Personnel Department.

Q You referred to a letter. I show you a letter dated October 11, 1979, addressed to Mr. Thornton from Attorney Robert L. Fisher on the letterhead of Cramer and Anderson and I ask you if that's the letter which you were given a copy of?

[17] A I believe this is the letter in question, yes.

MR. KULLER: I would like to offer that letter into evidence.

MR. FISHER: No objection.

THE CHAIRMAN: Mark that Company A, please. (Letter dated October 11, 1979, two pages, marked Company Exhibit A.)

BY MR. KULLER:

Q Now at that time what was Mr. Thornton's capacity with Caldor?

A He was the department manager of Men's, Boy's and Shoes.

Q What is the classification of a department manager?

A He's an executive of the company and of the store.

Q How many department managers were there in the Torrington store at that time?

A Approximately about 15.

Q How many so-called rank and file employees were there in the store at that time?

A I would say somewhere in the neighborhood of about 135, 140.

Q Do you know whether the rank and file employees were [18] represented by a labor union?

A Yes, they are.

Q Do you know what union that is?

A I believe—here again I'm not absolutely certain. It's either 919 or 888. I believe it's 919.

Q Now, what was the normal manning of the Caldor store on Sundays?

A The normal manning was anywhere between 45 and 50 rank and file people, generally four department

managers, a store manager or an assistant and a Sunday supervisor.

Q Now during the week, that is, other than Sunday, what would the normal manning of the Caldor store be?

A Store manager, two assistant managers, anywhere from between ten to fifteen department managers and a total I would say of about 90 rank and file people through the course of the day.

Q Now the rank and file people that worked on Sunday, were they part of the normal rank and file, or were they a separate group?

A We generally tried to run with a separate grouping of people who worked just Sundays so as not to impose upon the union people. But it was a separate group we hired. [19] They just worked the one Sunday. That was it.

Q By the way, the department managers were not part of the union group, they were part of the executive group, is that correct?

A Correct.

Q Now after Mr. Thornton had handed you this letter, Company Exhibit A, what did you say to him?

A I told him I would have to take the matter up with the personnel department, which I did.

Q What did you do with this letter?

A I sent it, forwarded it to Mr. Denkovich in the personnel department.

Q And what did you subsequently do about Mr. Thornton's Sunday work schedule?

A We did nothing. We were told by the personnel department to hold off and they would take care of it.

28a
Q Did you continue scheduling him on Sunday?

A Yes, we followed, continued scheduling.

Q Did he show up for work?

A No, he did not.

Q Now did you hear any comments on anything from anybody, other employees in the store?

(20) A Yes. The other department managers were getting quite angry. They said if Mr. Thornton didn't work that they weren't going to work.

Q How did you determine that?

A I had one department manager who approached me and told me that.

Q What did he say?

A She said—

MR. FISHER: Object on the basis of hearsay. I'm not sure what rules of evidence we are going to be adhering to. I know this is not a court but here is a blatant hearsay response which is probably going a little too far.

MR. KULLER: We are not trying to prove the truth of the statement but simply showing the situation existing then and why the company took the action it did. The fact that he heard certain complaints would make a store manager act in a certain way. If he had gotten a report that all the employees are happy he might have taken a different kind of action.

MR. FISHER: I'd claim that you're asking (21) specifically for a response which requires a hearsay statement.

THE CHAIRMAN: I'm going to sustain the objection.

MR. FISHER: Thank you.

28b
BY MR. KULLER:

Q Now what was the next discussion you had with Mr. Thornton relating to Sunday or related matters?

A The only other thing I really recall is getting a call from Mr. Denkovich asking me to set up an appointment with Mr. Thornton.

Q Who is Mr. Denkovich?

A He's the personnel manager, employment manager for Caldor. And to set up an appointment with Mr. Thornton that he would like to see him.

Q Do you know if that meeting was ever held?

A Yes, it was. In early December sometime because I had approached Mr. Thornton and told him Mr. Denkovich wanted to see him. Then I got a call back from Mr. Denkovich telling me that Thornton had agreed, that Mr. Thornton—

MR. FISHER: Again, I object. I believe Mr. Denkovich is here and can testify to what he said.

THE CHAIRMAN: Do you claim it?

(22) MR. KULLER: No.

THE CHAIRMAN: Sustain the objection.

BY MR. KULLER:

Q What happened subsequently?

A Mr. Thornton did not work the whole month of December.

Q 1979?

A 1979. Did not work the whole month of January.

Q And did an incident occur in and around New Year's Day of January, 1980?

A Yes, there was.

Q What was that?

A It was requested of Mr. Thornton that he work New Year's Day.

Q What day of the week was that?

A That was on a Tuesday, to give us the coverage in the store that we needed. I think that is the first time that we were going to be open on New Year's Day.

He was approached early in the afternoon and asked would he kindly work the coming Tuesday, New Year's Day? I think it was a Saturday that he was approached.

He at that point did not give me a direct answer. He said, "Let me think about it. I'm going to go to dinner. [21] I will let you know after dinner."

When he came back from dinner I approached him again and asked him and he said, "No," he's not working Tuesday because he's going down to New Jersey. And he didn't want to travel back and he did not work that Tuesday.

THE CHAIRMAN: May I interrupt for a moment? When you said that Mr. Thornton didn't work in the month of December or January, did you mean the Sundays in December and January?

THE WITNESS: Yes.

THE CHAIRMAN: Go ahead, Mr. Kuller. I apologize for the interruption.

BY MR. KULLER:

Q Did he give you any other reason for refusing to work on New Year's Day?

A He did mention that it was a legal holiday and I couldn't force him to work.

Q What was the next occasion in which you discussed Sunday work with Mr. Thornton?

A The next occasion would have been January 27th, which was inventory. Here again, everybody in the store is expected to work on inventory.

[24] Q Now you say inventory?

A Yes.

Q Can you briefly explain what is entailed in taking inventory in a department store like Caldor?

A Briefly it entails counting of every piece of merchandise in the store, physically counting it, listing it on papers as a dollar value.

Q Now for inventory in addition to the regular store personnel—

A We hire generally outside people.

Q Let me finish the question.

A Go ahead.

Q Do you bring in other executives to help supervise the taking of the inventory from the central offices?

A Yes, we do.

Q About how many come down?

A Generally around four, a captain and three assistants.

Q You bring in your entire work rank and file regular staff?

A Yes, we do.

Q Do you add anything to the rank and file?

A Yes, we generally hire around 50 people from the outside.

[25] Q So other than your supervisory executive staff, how many rank and file people do you have in the store to inventory?

A Aside from the executives, there are about 170, 180 people in the store.

Q And are all of the department managers called in that day?

A Yes, they are.

Q So, coming back to that day then, did you have a discussion with Mr. Thornton about his working?

A Mr. Thornton said that he wasn't working inventory Sunday.

Q Now can you describe what happened, what the conversation was that you had, what you said to him and what he said to you?

A I don't recall the conversation offhand. All I know is that Mr. Thornton said that he wasn't working Sunday.

Q Did this create any problem in his department?

A Yes, it did. People working in the department, in Mr. Thornton's department refused to work that Sunday because Mr. Thornton wasn't working it.

Q How did you know that?

A I asked them why they weren't working and they said [26] that they were not working that Sunday because Mr. Thornton wasn't working.

Q How did you finally get coverage of the department?

A The coverage of the department was all by novice people. They were all new people. It was covered by my Sunday supervisor who was not totally familiar with the department.

Q Did this problem arise in any other department in the store?

A No, it did not.

Q Any other department managers refuse to show up?

A No.

Q What action did you take after this inventory?

A After the inventory, the personnel department was called and told that he had not shown up, at which case I believe Mr. Capasso came down to talk.

Q Who is Mr. Capasso?

A Mr. Capasso is the training director of the Caldor chain. He's associated with the personnel department.

Q Do you know where that meeting took place?

A It took place in my office.

Q Did you attend it?

[27] A No, I did not.

Q Did Mr. Thornton then begin working on Sundays?

A No, he did not.

Q What happened after that?

A Well, when Mr. Capasso came out of the meeting—

Q No, strike that, please. You said that after that meeting with Mr. Capasso he did not resume working on Sundays?

A He did not.

Q What events occurred next, to your knowledge?

A When Mr. Capasso came out of the meeting he told me that Mr. Thornton was going to become a member of

the rank and file and that he would take care of the paperwork at Central. This would be effective as of Monday morning.

About a day later—wait—after the meeting—okay, after Mr. Capasso told me this, Mr. Thornton came up to me, told me he was feeling ill could he go home? I told him to go right ahead. He did punch out and left.

A couple of days later or a day later I got a call from Mr. Ranucci telling me—

Q Who is Mr. Ranucci?

A Ranucci is the regional director of the chain of stores. [28] Telling me not to do anything that he was going to come and talk to Mr. Thornton.

Q Do you know if such a meeting took place?

A Yes.

Q About when was that do you recall?

A This had to be toward the end of January sometime, toward the end of February, excuse me.

Q And did you take part in that meeting?

A I did not.

Q In your opinion what would be the effect on the store or other store personnel if Caldor permitted Mr. Thornton to remain as department manager and refuse to work on Sundays?

MR. FISHER: I'm going to object to this questioning on the basis of relevancy. The issue is very narrow. I don't think we are concerned with the effect on the rest of the store employees.

THE CHAIRMAN: I'll allow the question. You may answer the question.

A It would be very disruptive to the entire store because I think I would have a rebellion in the store from the other department managers in terms of "he's not working, [29] why should I work?" And this would be carried through to the employees that do work on Sunday.

Q Now did you make an effort to determine whether Mr. Thornton had worked on Sundays prior to your coming to the store?

A Yes. His time cards indicated that he had.

Q You say his time cards. Do all department managers punch in on a time card?

A They do.

MR. FISHER: I think we could stipulate to that.

MR. KULLER: Are you prepared to stipulate that prior to September in 1979 that Mr. Thornton had worked seven Sundays, in 1978 he worked 14 Sundays and in 1977 he worked ten Sundays?

THE CHAIRMAN: Do we have a stipulation to that effect, Mr. Fisher?

MR. FISHER: Yes. Subject to later correction I believe that your figures for 1979, '78 and '77 are approximately correct.

MR. KULLER: We will make available to you all our records if you want to check that out.

MR. FISHER: Okay.

[30] THE CHAIRMAN: All right, Mr. Kuller.

BY MR. KULLER:

Q By the way, you live in Newington, Connecticut?

A Yes, I do.

Q How far away is that from Torrington?

A It's an hour and ten minutes, about 26 miles.

Q Do you know whether Caldor's has a store in Chicopee, Massachusetts?

A I worked there also.

Q Where is that in relation to the Mass. Turnpike, do you know?

A Oh, it's right off the Mass. Turnpike. I don't know the exact exit.

MR. FISHER: We will stipulate it's near Springfield.

MR. KULLER: Okay.

That's all I have for Mr. Gallicchio.

THE CHAIRMAN: Mr. Fisher, you may examine.

CROSS EXAMINATION BY MR. FISHER:

Q Mr. Gallicchio, you indicated that for your Sunday work force you have a separate pool of employees that you use?

(31) A. Correct.

Q Are these employees who work on Sunday members of the union?

A They are not.

Q Why do you maintain the separate work force?

A First off there is an agreement I believe between 919 and Caldor stores that union employees can only work on a voluntary basis, so in order to staff the store we had to go outside and hire separate people because you could not get enough volunteers out of the union people to work on Sundays.

Q And how many rank and file members work on an average Sunday?

A Probably anywhere from 12, 13 people.

Q In the labor agreement between the union, whether it's 919 or 888, is there an agreement that the store will not require any union members to work on Sundays?

MR. KULLER: Excuse me, your Honor. I am perfectly willing to make the union agreement available rather than have speculation as to what the agreement is with Local 919. Article VII is entitled "Work week-overtime," and it provides (32) as follows:

Section 3-A: Work performed by employees on Sunday shall be considered as premium work. Such work shall be paid for at time and one-half the employee's regular rate of pay. Sunday work shall not be considered part of the basic work week. If not enough employees volunteer for Sunday or holiday work, the employer may then require employees to report for work in reverse order of seniority; provided, however, that no employee shall be required to report for work if working is contrary to said employee's personal religious convictions.

A, that the company shall not be required to offer Sunday work to employees covered by this agreement whether or not such work is made available to others. Persons employed in so-called Sunday crews shall not be employed to work on other days."

MR. FISHER: If you would make a copy of that available to me.

MR. KULLER: Certainly will.

MR. FISHER: Thank you.

(32) BY MR. FISHER:

Q I believe you said that the reason that this pool is required, this pool of separate employees is because you couldn't get enough volunteers from the regular force, is that correct?

A True.

Q Is any such accommodation of this type in existence for other than the rank and file employees?

A Yes, department managers can switch off with other department managers in terms of executive coverage, but—

Q But you don't have a separate pool—

A No, we do not.

Q —of department managers? Are department managers who work on Sundays given a premium pay as the rank and file workers are?

A Yes.

Q What is the differential?

A Time and one-half.

Q Does that differential also apply in the case of work on holidays?

A Yes.

Q Such as New Year's Day?

[34] A Yes, it does. As a matter of fact—

Q I don't have a question.

MR. FISHER: I don't think I have any other questions.

THE CHAIRMAN: Mr. Kuller.

MR. KULLER: The next witness is—

THE CHAIRMAN: Wait a minute. Do you have any other questions of this witness?

MR. KULLER: No, your Honor.

THE CHAIRMAN: Anyone on the panel have questions[?]

MR. McDONOUGH: No.

MR. SHEA: Is this the first time that you have been faced with the provisions of the statute in your role?

THE WITNESS: Yes, it is.

MR. SHEA: Had you been aware of it?

THE WITNESS: The provisions in the statutes?

MR. SHEA: In Statute 303(e)? The one that is at bar here today?

THE WITNESS: This is the first time I've encountered it, yes. Was I aware of it? I can't [35] really say I was aware of it.

MR. SHEA: Is there a bulletin board for employees in the Caldor stores?

THE WITNESS: Yes, there is.

MR. SHEA: Has that provision of the statute ever been displayed in any of the Caldor stores to your knowledge?

THE WITNESS: Not to my knowledge.

MR. SHEA: Not in the stores you work at?

THE WITNESS: Not to my knowledge.

MR. SHEA: Let me ask you a question about New Year's Day. Did you take any action against Mr. Thornton because he said he did not want to work on New Year's Day.

THE WITNESS: I may have reprimanded him verbally if anything. As far as any kind of disciplinary action, no.

MR. SHEA: What day was New Year's Day on?

THE WITNESS: Tuesday.

MR. SHEA: Tuesday. You may not be able to answer this, but maybe counsel for the company can, in the days in particular the 10 'n 77 and [36] the 14 in

'78 and the 7 in '79, how many days during those years was the Caldor store open?

MR. KULLER: You want counsel to answer that?

THE WITNESS: I really don't know.

MR. SHEA: I said that he may not be able to answer but maybe counsel can. I was going to interrupt you, but go ahead.

MR. KULLER: I do know that with the exception of the Sundays from I believe February, '78, the Sundays from October, 1978, about the month of October, 1978, that's right, with the exception of about the month of October, 1978, the store was open on every Sunday for that entire period.

MR. SHEA: That was the effective date of all—

MR. KULLER: No, the law became effective, the last revision became effective on October 1. We sort of, in that period we were naturally trying to get it enforced and we were closed when the trial court held it unconstitutional at the end of October or the beginning of November most of the stores opened up in the state and we followed suit. That was the only period in the 1977-78-79 period [37] that the stores were closed.

MR. SHEA: You are talking about the calendar year?

MR. KULLER: Right.

MR. SHEA: From October 1 of 1978 you are saying through December 31 of 1978?

MR. KULLER: That is approximately basically right.

MR. SHEA: You say he worked fourteen Sundays?

MR. FISHER: In 1978?

MR. SHEA: Then from January 1 of 1979 to the end of that calendar year he worked seven Sundays?

MR. KULLER: But he stopped working, the last work was in September, I believe. I think it was September when you joined the store that he told you—

THE WITNESS: Yes.

THE CHAIRMAN: Mr. McDonough?

MR. McDONOUGH: No.

THE CHAIRMAN: I have a couple. May I see the labor contract for a minute, please?

Mr. Witness, in regard to the members of Mr. [38] Thornton's department who refused to work on Sunday because of Mr. Thornton's refusal, was any disciplinary action taken toward any of those employees?

THE WITNESS: Absolutely not.

THE CHAIRMAN: All of the questions that have been directed to you referring to the sabbath I believe have been referring to Sundays. Have you ever experienced the situation where an employee has, where an employee in a management position has refused to work on any other day of the week claiming it to be his sabbath?

THE WITNESS: If you want me to go back a number of years ago, this goes back many, many, many years ago but I did have an employee who was a member of management with another company.

THE CHAIRMAN: I mean with Caldor.

THE WITNESS: Not with Caldor's.

THE CHAIRMAN: I have nothing further.

MR. SHEA: One more as a followup on Mr. Staley's question. Were any of the employees who indicated the possibility of not working, you said that none of them were disciplined. Was there a [39] threat of any action?

THE WITNESS: Absolutely not.

THE CHAIRMAN: All right. The witness is excused.
Do you want to call your next witness, Mr. Kuller?

MR. KULLER: I think we will call Mr. Denkovich.

MICHAEL DENKOVICH, called as a witness, having been first duly sworn by the Chairman, was examined and testified as follows:

THE CHAIRMAN: Would you state your name and address?

THE WITNESS: Michael Denkovich, 71 Longfellow Road, Shelton.

DIRECT EXAMINATION BY MR. KULLER:

Q How long have you been employed by Caldor?

A About six and a half years.

Q In what capacity?

A Employment Manager.

Q What do your duties consist of?

A Recruiting, employer relations, general function.

(40) Q Where are you located?

A Home Office in Norwalk.

Q I show you a letter which has been marked Company Exhibit A and ask you whether you have seen that before?

A Yes, I have.

Q Can you tell us when you first saw it?

A Mr. Gallicchio called me and he indicated that he had a situation with Mr. Thornton and he had a letter from his lawyer. And I asked him to send that down to me. And that was the first time I saw this.

Q What happened next in regard to Mr. Thornton?

A I got back to Mr. Gallicchio and asked if he could send Mr. Thornton down to tell me what his situation was to see if I could somehow resolve it.

Q Did you make any investigation at that time of his prior employment history?

A No, I hadn't, other than to ask if he had worked previous Sundays which I understood he had.

Q Who did you ask that of?

A I asked Mr. Gallicchio. He said, he indicated that he had worked Sundays previously. And then I had eventually documents, went back to the record to see whether or not he [41] had worked Sundays, you know.

Q When you say you met with Mr. Thornton—

A Yes.

Q —where and when?

A I met with him on December 13th in the home office.

Q Now can you tell us what happened at that meeting, what he said and what you said?

A I asked him what his situation was, and he indicated to me that he was supposed to have worked a few Sundays either September or October and he had switched them with other department managers in the store without getting authorization from management, either the assistant store manager or the store manager. And he indicated when Mr. Gallicchio became aware of it that he was, Mr. Gallicchio was annoyed and he said that there has to be management approval before you change your Sundays with another employee.

And, he, Mr. Thornton said to me that Mr. Galliechio said, "Okay, you are going to work the next two Sundays in a row or I'm going to quite unquote fire your ass."

Mr. Thornton said to me that he decided at that point that he was not going to work Sundays anymore.

Then continuing to talk to him he indicated to me [43] that he needed Sundays off in December to visit his son in New Jersey. Prior, somewhere during the conversation he also indicated to me, I asked him if he would be interested in being transferred to Massachusetts where the department managers don't work Sundays. And he told me that he would not be interested because he has a home in Litchfield. So he turned down the offer for Massachusetts.

Now on Sundays that he had asked to have off in December I told him that, you know, I would allow that as long as he gave me an assurance that he would go back to the normal Sunday schedule as he had in the past after the first of the year. And he assured me that he would go back to working Sundays after the first of the year if Mr. Galliechio didn't, as he said quite unquote harass him. With that assurance I gave him the Sundays off in December and obviously he didn't go back to work Sundays after the first.

Q Now subsequent to your meeting with him did you write him a letter?

A Yes, I did. I wrote him a letter confirming our conversation.

Q I show you a letter dated December 17, 1979, and ask you if that is the letter that you sent to Mr. Thornton?

[43] A Yes, it is.

MR. KULLER: I would like to offer that letter into evidence.

THE CHAIRMAN: Do you have any objection, Mr. Fisher?

MR. FISHER: I have no objection to the letter.

THE CHAIRMAN: Marked Company B.

(Letter dated December 17, 1979, marked Company Exhibit B.)

BY MR. KULLER:

Q Now, you say you offered him a transfer to Massachusetts. Can you describe this offer in more detail?

A I offered him a similar position as department manager, which he was, in the Massachusetts store.

Q At that time where were the Massachusetts stores, what were the Massachusetts store which you were discussing with him?

A I left it open, you know, open to him as to which stores he wanted to go to. If he had indicated a particular group of stores I would have sent him to the grouping of stores.

[44] Q What were they?

A Chicopee was the closest.

Q To your knowledge. First of all where do you live?

A I live in Shelton.

Q How long is Shelton from the central office?

A About forty minutes.

Q To your knowledge, do any Caldor executives live in New York City or Long Island?

A Oh, sure.

Q Do they travel to the office everyday?

A Yes.

Q How long a trip is that?

A From Long Island they travel as much as an hour and a half.

Q The trip from Litchfield to Chicopee would not be any longer than that, would it?

A I believe it's somewhere around an hour.

Q When was the next time you had heard about Mr. Thornton?

A Mr. Gallichio called me and he indicated, this was I guess when we were going into the Sundays around New Year's time, and I indicated to Mr. Gallichio that he could start [45] scheduling him his normal Sundays and that I had Mr. Thornton's assurance that he would go back to working Sundays.

And when his rotation came up, Mr. Gallichio told me that he refused to work that Sunday. So, you know, to me at that point obviously everything we had discussed went down the tubes.

Q What did you do at that point?

A I checked with my supervisors and we sent, I called up Mr. Capasso and asked him if he would stop in and see Mr. Thornton and see if there is any way he could resolve the situation.

And I also indicated that if he could not resolve it that we would offer him a rank and file position in that store.

Q Now exactly what did you mean by that?

A Full time position in the store in that department so he would be in a non-supervisory position.

Q He would then come under the union contract?

A Yes, fall into a union position of which we don't require them to work on Sunday so he would not have that situation.

Q Did you suggest to Mr. Capasso a rate to offer?

[46] A Yes. I don't remember the specific rate but I did, I remember our objective was to give him the highest rate of anyone in the department.

Q And the highest rate of any union person in the department?

A Exactly.

Q You say you do not recall the exact rate?

A No, I don't.

Q At that time what was the minimum union scale for so-called thirty day employees?

A Three twenty-two an hour.

Q Do you recall whether most of the union employees were around that scale at that time?

A Most people were at that level, yes.

Q Now I show you this document which is entitled Agreement Between Retail Employees Union 919 and Caldor, Inc., and ask you whether you can identify that?

A The contract with Caldor.

Q Is that the form in which it's distributed to the employees of the various Caldor stores?

A Yes.

Q Who distributes that?

58a
[47] A I believe each store gets a package of them and the store manager distributes them or makes copies available to the employees.

Q Have you seen a copy like that before?

A Yes.

MR. KULLER: Now I would offer this contract into evidence as Company Exhibit C.

MR. FISHER: No objection.

THE CHAIRMAN: Marked Company C.

(Document entitled Agreement Between Retail Employees Union 919 and Caldor, Inc. was marked Company Exhibit C.)

MR. KULLER: Your Honor, I don't have copies of this, may I supply them for the record?

THE CHAIRMAN: If you would be kind enough to supply them later on I will mark this one.

One other thing, although I like the title of "his Honor" I haven't been given that title yet by the State of Connecticut. You are free to call me either Mr. Staley or Mr. Chairman. Your Honor is too high.

[48] BY MR. KULLER:

Q If Mr. Thornton became a rank and file employee of the Torrington store he would fall under this contract automatically, would he not?

A Yes.

MR. KULLER: I would like to point out to the Board that being a so-called rank and file employee under the union contract that that would give Mr. Thornton certain rights he does not have as a Caldor executive. That includes a grievance procedure, provision against discharge without cause. He would be relieved of any obligation to perform any Sunday work. And he would have a regular schedule of wage in-

creases provided for by this contract as a rank and file employee.

MR. SHEA: Excuse me, are the wages specified in there by any chance?

MR. KULLER: Yes, but they are in terms—on page 96 of the contract but it's in terms of an increase over whatever—

MR. SHEA: Just a percentage?

MR. KULLER: That kind of thing. I think Mr. [49] Denkovich—

MR. SHEA: Three twenty-two is the minimum?

MR. KULLER: That's right. What happened during this period this contract was made in 1978—I don't recall when it was but at a certain point very rapidly there was a minimum law and it began to catch up with the wage rates in the union contract. I recall the minimum law, it brought the south into the United States because that's where it had its biggest impact. Here in the east under the recent law we began to feel the real impact here now.

I have no further questions of Mr. Denkovich.

THE CHAIRMAN: Mr. Fisher

CROSS EXAMINATION BY MR. FISHER:

Q Mr. Denkovich, do you know how far Litchfield is from the Chicopee area?

A I believe it's about an hour.

Q Do you know how many miles it is?

A No.

Q Do you know how many miles it is from Litchfield to Hartford?

[50] A No, I don't.

Q. Do you have any idea how long it takes to drive from Litchfield to Hartford?

A. No.

Q. Do you know how long it is to drive from Hartford to Springfield in the Chicopee area?

A. No.

Q. Now, Mr. Denkovich, when you and Mr. Gallicchio discussed Mr. Thornton's possible transfer into a rank and file job, do you know what pay scale he was then under as an executive, as department manager?

A. I didn't discuss that with Mr. Gallicchio. I discussed that with Mr. Capasso and I believe his rate was six something an hour.

Q. And if he had been transferred into a rank and file job even within that same department his pay then would have been in the neighborhood of what? Three twenty-two?

A. I don't remember the figure although it would have been under four dollars an hour. I would say somewhere within the range of three-fifty to four dollars an hour.

Q. And correct me if I'm wrong, but I believe you stated that the employees collected under the collective bargaining [§1] agreement are not required to work on Sunday?

A. Right.

Q. And I believe you pointed out that as being a possible advantage because as an executive, executives are required to work on Sunday, is that correct?

A. Yes.

Q. And in fact is it not the position of the company that executives working for the company are required to work on Sundays?

MR. KULLER: I object to that, your Honor. I don't think that is a proper question. That is asking a legal conclusion.

THE CHAIRMAN: I think he asked if he knew. I think that is proper cross examination. I'll allow the question. If he knows the answer he can testify.

Do you remember the question?

THE WITNESS: No.

BY MR. FISHER:

Q. Generally speaking, are executives within the company or executives who work for the company required to work on Sunday?

(12) A. Yes, we work Sundays, sure, with the accommodations if needed like if we have to go to a bar mitzvah we will allow time off for that.

Q. And if an employee flat out, if an executive working for the executive flat out refuses to work on Sunday what is the company's position?

A. I've never really had that happen, never really come to that point.

Q. But it's company policy that the executive is required to work Sundays sometimes with the accommodations that you have mentioned?

A. Yes.

MR. FISHER: I have no further questions.

THE CHAIRMAN: Any questions by members of the panel?

MR. McDONOUGH: No.

62a
THE CHAIRMAN: I have one.

Mr. Thornton being a department supervisor, is he subject to being transferred involuntarily? Is he by the company?

THE WITNESS: Well, if we had asked him to take a transfer we would try to do it without it being [53] a hardship on the employee.

THE CHAIRMAN: Suppose you, in your capacity as personnel director decided that Calder needed a new manager of the men's department in another store? Would you have the authority to transfer Mr. Thornton from one store to another?

THE WITNESS: I would ask him if he would go.

THE CHAIRMAN: What if he wouldn't?

THE WITNESS: If he wouldn't nine times out of ten he would stay in the position where he is. If there was travel we would give him an increase in travel. As long as it's not a hardship we would hope that he would go.

THE CHAIRMAN: If he would not go he's not required under your system to go, is that correct?

THE WITNESS: No, no.

THE CHAIRMAN: No, meaning he is not required to go?

THE WITNESS: That's correct.

THE CHAIRMAN: Thank you. Do you want to call your next witness?

MR. SHEA: Let me see if I understand what he's [54] saying.

Are you saying that the transfers are by mutual agreement?

THE WITNESS: That is the way we try to have it.

MR. SHEA: Does it always work out that way?

62a
THE WITNESS: Most of the time, yes, if it's handled properly. Ninety-nine percent of the time.

MR. SHEA: Most of the time or ninety-nine percent of the time? Do you know of any instance where the company effected a unilateral action by transferring an employee against his wishes?

THE WITNESS: No.

MR. SHEA: You don't know of any?

THE WITNESS: No.

MR. SHEA: Okay.

THE CHAIRMAN: You are excused. Next witness Mr. Kuller.

MR. KULLER: Mr. Ranucci, please.

[55] ANTHONY RANUCCI, called as a witness, having been first duly sworn by the Chairman, was examined and testified as follows:

THE CHAIRMAN: Please be seated and state your name and address, please.

THE WITNESS: My name is Anthony Ranucci, R-A-N-U-C-C-I. I live on Ore Hill Road, New Fairfield, Connecticut. My mailing address because we don't get mail delivered, this happens to be Albion Road, Brewster, New York 10509.

DIRECT EXAMINATION BY MR. KULLER:

Q Mr. Ranucci, are you presently employed by Calder?

A No, I'm not. I'm retired.

Q When did you retire?

A I retired the end of March of this year.

Q And how long did you work for Calder prior to that time?

A Eleven years.

Q In what capacity?

A As a regional director.

Q Can you give a brief statement of what the duties are of a regional director.

A The regional director is responsible for approximately eight or nine stores, depending on the region that he's given, for the merchandising and operational function of his respective stores.

Q And who reports to you?

A Every store manager, every store reports to me. Store manager and assistants, whatever merchandise might be in the area and the department managers and the rank and file through the store manager.

Q How many regional supervisors does Caldor have in similar jobs?

A About seven. There might be more now since I retired.

Q Was Torrington included in your region that you were responsible for?

A Yes, it was.

Q Who did you report to?

A I reported to, I reported to Jerry Morgason (phonetic) who was the director of stores.

Q He's located where?

A The main office on Glover Avenue.

[57] Q Now when did you first hear of Mr. Thornton?

A Well, I received a call from the director of operations sometime in February that we had a little bit of a

problem with Mr. Thornton relative to working on Sundays, and would I go and speak with him?

THE CHAIRMAN: This is February of 1980?

A Yes, sir. At which point I went to the store and sat down with Mr. Thornton to discuss whatever problems he may have relative to this situation.

He indicated to me at that time that he did have a son or children in Jersey, that certain Sundays it was impossible for him to work, and at which point I said, "Well, we're scheduled and the schedule is posted, and you are required to work one Sunday out of the month, that if you did run into any kind of a problem, management would be more than happy to change it with somebody else, that there wouldn't be any problem there whatsoever."

In our discussion he indicated that he would get back to me, that he would think very clearly on returning to work on Sundays, and he was to call me in the next day or two.

For some reason, Mr. Thornton called me maybe three or four days later, which was all right as far as I was concerned. [58] And he still wasn't sure. He wanted to discuss it, he said, with his lawyer, and would I give him more time?

I said, "By all means you take the time."

I said, "By the way, you are still the department manager in men's and boys. You will function as department manager until we have a mutual agreement otherwise."

The functions there were running his department merchandise-wise and personnel-wise and scheduling his people in his department on when to report.

As an aside, as a side statement, Don said, "What is the need really for schedules? Why do you have to have schedules?" At which point I made the statement that,

"Listen, we have peaks and we have valleys in the days, you know, where we make schedules so not everyone will come in on Monday and nobody come in on Tuesday and Wednesday and Thursday. Therefore we make schedules for the rank and file and we have been doing it for many years."

And I said, "That's the reason we make schedules for department managers."

Didn't hear from Dan for maybe ten days or so. And I received a call from our director of operations to go up and see Don Thornton and to resolve the situation that day, [18] and if he still had not made up his mind he would have to revert back to rank and file on the following Monday. That I believe was a Thursday. I don't quite remember.

I went to Mr. Thornton. We sat down in the office and I questioned him on what his decision was. He did state to me at the time that he was not going to work on Sundays and that was his decision.

I said, "Well, I have no alternative other than to revert you back to a rank and file at \$3.50 an hour beginning this Monday."

Q Where did you get the three-fifty an hour figure from?

A That figure was given to me by the director of operations. And we felt that that was a salary which would be the highest rate of pay in the department.

THE CHAIRMAN: What date was that that he was going to be reverted to rank and file?

THE WITNESS: I think I wrote a memorandum—

Mr. KULLER: I'm coming to that.

BY MR. KULLER:

Q Mr. Rassenti, I show you a memorandum on yellow paper dated March 6, 1990 and ask you if you recognize that?

[40] A Yes. This is a memo that I wrote and sent into the main office.

Q Is this a memorandum of the meeting you had just had with Mr. Thornton?

A The meeting which I had just had which I did not finish in our conversation.

Q That's all right.

A I'm sorry.

Q Let me follow up that question by asking you this. Now this memorandum refers to the date March 6?

A That's correct.

Q And it states a meeting was held on Thursday, March 6th, 1990, is that correct?

A That's correct.

Q That was the date of the meeting?

A Right.

Q You say you prepared this memorandum yourself?

A I did. That's my handwriting.

Q What did you do with it?

A I put it in the mail and sent it into our personnel office in Central. I made a telephone call at that point and notified Mr. Kasinitz on the outcome of this meeting.

[41] MR. KULLER: I would like to offer this memorandum in evidence as Company Exhibit D.

Mr. FISHER: No objection.

THE CHAIRMAN: Mark it Company D.

(Memorandum dated 3/6/60 marked Company Exhibit D.)

MR. KULLER: I have no further questions.

THE CHAIRMAN: Mr. Fisher.

MR. KULLER: I have no questions.

THE CHAIRMAN: Are there any questions from anybody on the panel?

Do you want to call your next witness?

MR. KULLER: I have no further witnesses.

THE CHAIRMAN: Mr. Fisher, do you want to call your first witness?

MR. FISHER: Thank you, Mr. Chairman. Mr. Thornton, please.

([REDACTED]) DONALD E. THORNTON, called as a witness, having been first duly sworn by the Chairman, was examined and testified as follows:

THE CHAIRMAN: Please be seated and state your name and address for the record.

THE WITNESS: Donald E. Thornton, R.R. 4, Unit 8C, Tapping Reeve Village, Litchfield.

DIRECT EXAMINATION BY MR. FISHER:

Q Mr. Thornton, how long have you lived in Litchfield?

A Four years.

MR. KULLER: Excuse me?

THE WITNESS: Four years.

BY MR. FISHER:

Q Direct your responses to the Board and to the stenographer so he can hear you.

Where did you live before you moved to Litchfield?

A I lived in Wolcott two years.

Q Connecticut?

A Yes.

Q And when did you begin your employment with the Caldor Company?

A I started with them, I was with them a total of five years. I started my employment with them in the Waterbury store in the Men's-Boy's Department.

Q Try to speak up a little bit. You say that you have now been or you were at a time earlier this year with the Caldor Company about five years?

A Yes, five years and four months.

Q What position did you have when you started with the Waterbury store?

A Department manager.

Q You came into the company directly as department manager?

A Yes, I did.

Q How long did you work for the Waterbury store?

A I was in the Waterbury store approximately about three and a half years, four years at the most.

Q Did you then transfer, were you then transferred within the company?

A Yes. I was approached and asked if I would like to go to the Torrington store. As a man who would like to transfer to a closer store I said, yes, I would be willing because it was closer to my home. Save on fuel and time.

[64] Q And how far is the department or, excuse me, how far is the store in Torrington from Litchfield?

A About eight miles.

Q Do you recall what your salary was when you started working at the Torrington store?

A Six forty-six.

Q Per hour?

A Per hour.

Q And what was the approximate date when you started?

A I would say it was the first part of October of '78.

Q And your position in the Torrington store there, Mr. Thornton, you were department manager of men's and boy's?

A That's correct, and also shoes.

Q During your period of employment as a store manager in Torrington, were you given any employee efficiency ratings?

A Yes, I had. I was given one by a Mr. Wright.

Q And do you know what the rating was or report?

A As far as I know the rating was favorable. I received an increase.

Q Were you even disciplined for any improper acts?

A No, not to my knowledge.

Q Now, Mr. Thornton, you've heard testimony about the [65] problems which arose regarding your work on Sunday, and I'd like for you if you will to describe how this problem occurred from your perspective.

A Would you repeat that?

Q I'll rephrase the question. How did the problem with work on Sunday occur, how did it come up in the first place as far as your perspective is concerned?

A Well, when the company decided to open their doors on Sunday, which in the beginning they had been reluctant and I believe they had gone to court on different occasions, and of course the Blue Laws were rescinded and for competitive purposes they said they would have to open their doors up.

They came to us. They had a meeting of the DM's—

Q What is that?

A Department Managers. It was mentioned to us at the time that he would be working on Sundays.

Q Approximately when did this meeting take place?

A This was about two and a half years ago. This was in the Waterbury store.

At that time there was a few of us that were a little reluctant to work on Sunday but we didn't know we had a recourse. And then at that time one of the managers spoke up [66] and said, "You must work on Sunday. There is no recourse. And if you don't do it the company will find one way or another to get rid of you." And that was Mr. Coyne. At that time he was an assistant manager.

Q At that time did you decide that you would go along and work on Sunday?

A I felt as a working-class man and having responsibility and managing my household as a sole person I had no recourse. I didn't realize that there was any provision in any law or statute to protect me. So I gave up my sabbath.

Q What is your sabbath?

A My sabbath is Sunday.

Q What religion are you?

A I am Presbyterian.

Q Did anybody in the store ever ask you what your faith was?

A No.

Q Did you communicate at some time that your sabbath is Sunday to any individual in the Torrington store?

A Oh, yes, I did.

Q Do you know approximately when?

A Well, as far as exact dates, it was just in a general [67] conversation that Sunday was my sabbath and that there was a lot of times I would like to have worshipped. By my general belief I can't accumulate enough in six days and give some sort of things in the seventh which is my belief as a Christian person and with my upbringing, I thought that anything that I have made on the sabbath as far as dollars and cents would do no men any good and I was under that assumption.

But I still did not have the knowledge of the statute. And I thought that, well, I have to make a living. You will have to sacrifice. And I still had in the back of my mind that if I had to give up my sabbath I would work and I would have to take those X amount of dollars and give it to my church in order to live with a decent conscience.

Q Mr. Thornton, in your discussions with your supervisors or the other individuals in the company, did anyone tell you that there was a way you could continue to work as an executive and not work on Sunday?

A No, they told me that they would have to relieve me definitely from that position and the only way that I could continue being a DM would be to give one Sunday a month.

Q No I believe, Mr. Thornton, that there was some discussion about a possible transfer to a store outside the [68] State of Connecticut, specifically—

A Right, it was discussed, right.

Q And what was your reaction to that?

A I refused.

Q Why?

A For mileage reasons, nothing had been discussed about compensating and I wasn't interested in being transferred because of my home and still it was not going to solve the problem of not only myself but my fellow department managers as to being able to respect their sabbath, that I was to be transferred to Massachusetts, that meant that just anybody would have to go that route in order to survive being employed by Caldor.

Q Do you rent or own your home?

A I own my home.

Q Would you have found it inconvenient to drive to Chicopee?

A I would have found it very much a hardship.

Q Now, Mr. Thornton, you were here when Mr. Denkovich testified that you and he had a discussion regarding, in December, if I'm not mistaken, regarding your working on Sundays. Do you recall conversing with Mr. Denkovich?

[69]A Yes. I was requested if I would have a meeting and we had one. I went down and we discussed the

situation thoroughly in all aspects, including the transfer to Mass. where the stores are closed on Sunday. I rejected it. And I told him that I was completely happy with what I was doing and why wouldn't he let me observe my sabbath as a DM in the Turrington [sic] store?

Q Mr. Thornton, Company's Exhibit B is a letter purportedly addressed to you, signed by Michael Denkovich dated December 17, 1979.

Did you ever receive that letter or the original of that letter from the store or from anybody?

A No, I have never seen it and never received a copy of it, only today.

Q It is your testimony, Mr. Thornton, that today is the first time that you have seen this?

A The first time I've ever seen the letter.

Q Did you ever agree with Mr. Denkovich that in exchange for having Sundays off in December, 1979, you would agree to work Sundays in 1980?

A Oh, no, no. I think that there was all kinds of things... we went all around the barn. And when we finalized [70] our meeting I said, "Regardless of a transfer or negotiations, the only reason why I'm doing this, it's not because I want to harm the company in any way. They have been fair to me. But the only aspect that I feel that they have been totally unfair is that I had been unable to respect my sabbath."

And I said to him when I left, I shook his hand and I said, "Just let me respect my sabbath."

Q Have you ever indicated any other day besides Sunday as your sabbath?

A No, I would have no reason.

Q Have you changed your religious faith within the past five or six years?

A No, I've always been the same thing.

Q Do you intend to change your sabbath to another day of the week?

A No, I do not.

Mr. FISHER: I have no further questions of Mr. Thornton.

THE CHAIRMAN: Mr. Kuller.

CROSS EXAMINATION

BY MR. KULLER:

Q Mr. Thornton, do you recall a meeting with Mr. Frank [71] Capasso?

A Yes, I do.

Q Do you recall that that took place in February of 1980?

A I'm not sure of the exact date, but I know there was one in Turrington.

Q Before your meeting with Mr. Capasso though?

A Yes, it was.

Q In that meeting do you recall Mr. Capasso saying to you that department managers must be able to work one of four Sundays?

A Yes, he did.

Q Do you recall saying to him that I don't need this job, my parents left me a legacy?

A No, not precisely. It wasn't in that terminology.

Q What was it?

A The general conversation of the meeting—I did not retain all of it only that the man greeted me in a very familiar nice way. And he stated to me that the company was going to allow me to take off for the sabbath.

Q I didn't ask you that, I asked you whether or not you had a conversation about your parents leaving a legacy.

[72]A I don't recall that. It may be in the conversation, sir, but at the moment I do not recall it.

Q But in fact your parents did leave you a legacy?

A I don't feel that that is of interest right at the moment.

THE CHAIRMAN: Mr. Thornton, I would direct you to answer any questions that are asked of you unless there is a ruling by the Chair that you are not required to answer the question. And at this time there's been no objection by counsel. Therefore, I direct you to answer that question that Mr. Kuller asked you.

Mr. FISHER: Mr. Chairman, I'm going to object solely on the ground of relevancy. Whether or not Mr. Thornton has or it's expected that there will be a legacy at any time or that there was at that time, I really think that is not relevant to the issue.

THE CHAIRMAN: Do you claim the question?

Mr. KULLER: I do, sir.

THE CHAIRMAN: I'll sustain the objection.

Mr. FISHER: Thank you, Mr. Chairman.

(73)BY MR. KULLER:

Q Do you drive on Sunday?

A Pardon me?

Q Do you drive on Sunday?

A Yes, I do.

Q Do you write letters on Sunday?

A Yes, I do.

Q You write letters on Sunday?

A Yes, occasionally I have.

Q Do you use the telephone on Sunday?

A Yes.

Q Do you ever sit and watch athletic events on Sunday?

A Very rarely unless strictly for fellowship.

Q Strictly for fellowship?

A Right.

Q Do you regard your fellow department managers as fellows?

A Yes. Every mankind regardless of department manager is part of fellowship.

Q What else besides not working at Caldor's on Sunday won't you do on Sunday.

A I will not labor.

[74]Q I see.

Mr. FISHER: I'm going to object to this line of questioning, Mr. Chairman. It's clear that he has, that the witness has designated his sabbath and how he chooses to observe that sabbath is not probative or relevant, has not bearing on the issues before us, on the issue I should say before us.

Mr. KULLER: I don't understand how a man can claim a sabbath and refuse to be interrogated about whether his claim is bona fide. Whether it is a sabbath objection or conscientious objector refusing to

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go to war on the basis of his claim, his merely saying so cannot be the end of the matter.

THE CHAIRMAN: I'll overrule the objection and allow the question to be answered.

MR. KULLER: Would repeat the question?

(Last question read back.)

A No formal labor anywhere I receive monetary value, anything monetary.

Q But you already testified you gave your salary away?

THE CHAIRMAN: Wait. That's not my understanding of how he answered the question. My understanding of [75] the answer to your question is that if he had to work on Sunday he's willing to give his money to the church because he felt that way. I don't believe he testified that he did do it.

MR. KULLER: Sorry.

THE WITNESS: That's right.

BY MR. KULLER:

Q You did work on Sunday for a considerable period of time?

A Yes, I did.

Q What did you do with your earnings from Sunday labor?

A I had given some of my money to charitable causes. I used some of it for my own personal gain.

Q Well, would it have solved your problem if you continued working on Sunday if you gave all the money to charity?

A I said my conscience wouldn't have allowed me to continue to work on Sunday and have the dollars and

cents without giving them to the church or to charitable organizations.

Q It was your conscience that bothered you?

A Yes, my conscience bothers me, sir, when I have to [76] give up my sabbath.

Q Do you have any Presbyterian friends?

A I have many Presbyterian friends.

Q Do any of them work on Sundays?

A Their personal outlooks or concern in the matter we have never discussed. I don't know their personal preference if they have one.

Q Before moving to Litchfield, Connecticut, where did you live?

A New Jersey.

Q Do you still have family in New Jersey?

A Yes, I do. I have one son.

Q Whereabouts in New Jersey?

A Sparta, New Jersey.

Q Do you visit your son in Sparta?

A Yes.

Q On Sundays?

A Yes.

Q Is there an assistant store manager in Torrington named Bourassa?

A Yes, there is, sir.

Q Have you ever spoken to him?

[77] A Many times.

Q Would you cast your mind back to May of 1977? Do you recall being concerned that a salary increase that you had requested, that you had made, that it had not come through?

A I believe at that time Mr. Wright mentioned before or earlier that he had reviewed me and I believe discussing that with Mr. Bourassa and asking him if he had heard as to whether the review was favorable.

Q Do you recall saying to him that if anyone was not getting a raise that someone ought to have the decency to tell him? Do you recall telling that to Mr. Bourassa or words to that effect that if you weren't going to get a raise that somebody should have the decency to tell you?

A I believe after a person has discussed with someone like half an hour or forty-five minutes the review that if it had been denied I believe that that person that was in charge of the review should have the courtesy to come to me and say, "Doc, your review has been denied on some particular grounds." And if those grounds were negligent of my behavior I would be able to correct them.

Q Didn't you say to Mr. Bourassa that if you did not [78] get the raise you are not going to work any longer on Sundays?

A No, that is not true.

Mr. KULLER: I have no further questions.

THE CHAIRMAN: Anyone on the panel have any questions of Mr. Thorson? Do you have questions on redirect, Mr. Fisher?

Mr. FISHER: No, I don't.

THE CHAIRMAN: The witness is excused. Next witness.

Mr. FISHER: No more witnesses, Mr. Chairman.

THE CHAIRMAN: Do you have any witnesses, Mr. Kuller?

Mr. KULLER: May I have just a moment, your Honor?

THE CHAIRMAN: I would love to get that permission.

Mr. KULLER: No, your Honor, that concludes my case.

THE CHAIRMAN: I will declare the evidence in this matter taken and the hearing as to evidence closed.

Gentlemen, you understand our procedure, you have the right, either side, to file a written brief. [78] Do either or both sides wish to do that?

Mr. KULLER: I think I would like to file a brief, your Honor.

THE CHAIRMAN: What time for filing of briefs? How much time do you want?

Mr. KULLER: Would the Board like to have this transcript first?

THE CHAIRMAN: Yes, I would like to have a copy.

Mr. KULLER: Perhaps if we could ask the reporter.

THE COURT REPORTER: About two weeks.

Mr. KULLER: Shall we say two weeks after the transcript that the briefs should be filed?

THE CHAIRMAN: Why don't we say the briefs will be filed five weeks from today?

Mr. FISHER: Simultaneously?

THE CHAIRMAN: Yes, and the briefs are filed with the Board here, gentlemen.

Now, in addition to that either side or both sides can make a closing argument at this point if they would so desire. There is no requirement on that.

You can cover anything in your brief, but I don't want to preclude you from saying anything now.

[30] MR. FISHER: I would like to speak very briefly.

(Laughter.)

THE CHAIRMAN: Mr. Kuller, you said you wanted to make a closing argument?

MR. KULLER: Mr. Chairman, it's obvious that Mr. Thornton has certain personal views. Whether it is Presbyterian doctrine is not for us to determine. But I think it indicates why the statutes of this type of affair have been narrowly construed and to a large extent been declared unconstitutional.

I want to refer to the great judge who faced this question and wrote magnificently and briefly about this problem. Judge Learned Hand, sitting in the Second Circuit in 1912, one of the last cases he decided and ironically enough it's recorded in Volume 1 of Employment Practice Decisions. This was the first update of statutes after the Civil Rights Act; that they started publishing a new series and for some reason—I could give the historical background. But the first case in this series was of a case of a man who was discharged for a similar reason and asked for injunctive relief.

[31] In denying the injunction, Judge Hand made the following statement on which I will rest:

"The First Amendment protects one against action by the government though even then not in all circumstances, but it gives to one the right to insist in pursuit of their own interests that others must conform their conduct to his own religious convictions. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed. Yet he would have no constitutional rights to insist that the saloons must be closed. He would have to leave the city or put up with the iniquities

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dens or the economic losses which is change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the cosmetic necessary in communal life. And we can hope for no reward for the sacrifices that may be required beyond our satisfaction from within our expectations of a better world."

Nothing further I can say.

THE CHAIRMAN: Mr. Fisher.

MR. FISHER: Well, Mr. Chairman, and Mr. Shea, [32] and Mr. McDonough, I don't have a passage from Judge Learned Hand to quote from but I think there is an obvious difference between the context from which that was quoted and the situation that we have.

We are not talking about a government meddling in religion. We are talking about a private employer and a private employee and the protections which are allowed and provided by law, principally in this case Section 53-303(e) of the Connecticut General Statutes.

This provision is one of the means of protection for a private employee who is not, for example, a member of a labor union. It's a protection which is necessary especially in view of the repeal of the Sunday Blue Laws. Were it not for this statute and others like it, the employer would be in a position to dictate to its employees what days, and the next step would be the hours that the employees would be required to work.

And it's not just Mr. Thornton, but it's anybody who has religious beliefs that he wishes to exercise and that is the thrust of this statute. [33] And to attack it on its constitutionality at this point is certainly premature.

The company has presented evidence and testimony, and I'm going down by the way in the employ-

er position statement provided on the pre-hearing information sheets. The company pointed out or said Mr. Thornton was not discharged, that he rejected the company's offer to accommodate by transferring him to another position where Sunday work was not essential and he resigned.

Now the company did attempt to make an accommodation. The company attempted to have Mr. Thornton pack up and start working in Chicopee, Massachusetts, which I believe was testified to be an hour, an hour or so away. I think that the Board can take if not judicial notice at least notice of the fact that Litchfield is about an hour from Hartford and you will know better than I do how far Chicopee is from Hartford. It was not a reasonable offer of compromise.

The company has also said there is no store within Connecticut which is a suitable place for [84] Mr. Thornton to work on days other than Sunday. But let's go back to that first line in the position, their statement that Mr. Thornton was not discharged. He was required if he was to continue his employment to take a position which was described as rank and file with a cut in pay from something over six dollars an hour to three-fifty per hour. He would lose his status as a department manager where he started when he came into the store and thereafter he would be working for the same people with whom he previously was on an equal level.

There was also a great deal of testimony which turned on Mr. Thornton's observance of his sabbath. It's our position that any inquiry into the means or the practice by an individual employee or otherwise, inquiry into a citizen's observance of his sabbath and how he does it is beyond not only the intent of the statute, certainly the scope of it, but it opens up a whole new door that should not be opened. Employers, whether they are private or otherwise, should not be in a position to inquire into the sabbath prac-

tices of their employees and then decide [85] whether or not that is qualified under the statute.

Item 3 on the position statement goes to the constitutionality of the statute. Well, I assume that the courts one day are going to decide this issue. I am not going to argue that at this time. Certainly there is a presumption that a validly enacted statute is constitutional. And I think enough said about that issue.

And the final statement in that section is the unconstitutional basis and the impermissible governmental entanglement with religion. Our legislature has enacted the statute to protect the employees, and what the company is attempting to do is to circumvent not only the letter of the law but the spirit of it.

The last part, the last most important part of this entire exercise is the testimony by the company, by the company's witnesses, and on cross examination of Mr. Thornton. Mr. Kuller asked specifically, whether he recalled Mr. Compasso stating that it was company policy to require executives to work at least one weekend per month? And earlier Mr. Denkovich [86] also testified that it was company policy to require executives, employees of the company, to work Sundays, as a condition of employment.

The statute, 53-303(e), says that no person who states that a particular day of the week is observed as his sabbath may be required by his employer to work on such day. The statute then goes on to refer to discharge by an employer for an employee's failing to work on Sundays but that does not lessen the impact of that one sentence. No person shall be required to work on Sundays, and Sunday is the designated day for Mr. Thornton.

I think on the face of it by the company's own admission, they are violating this section of the law. I don't see any way around it. It's company policy which is the cause of work on Sundays.

It may very well be that this is going to come up in court, but on the face of it I don't see any way around the fact that a violation of this statute has occurred by Mr. Thornton and any other employees being required to work on any day of the week designated by the company, including the sabbath.

(87) THE CHAIRMAN: Thank you, gentlemen.

MR. FISHER: Thank you, Mr. Chairman.

THE CHAIRMAN: And we will have your briefs within approximately five weeks with the understanding that they will be two weeks after the record has been received. Thank you for your cooperation.

(Hearing concluded at 1:30 p.m.)

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LIST OF WITNESSES

WITNESS:	DIRECT	CROSS
Robert Gallicchio	12	30
Michael Denkovich	39	40
Anthony Ranucci	55	—
Donald E. Thornton	62	70

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C	Union Agreement Between Local 919 and Calder, Inc.	47
D	Memorandum dated 3/6/80	61

(Exhibits omitted in printing)

CERTIFICATE

I certify that the foregoing proceedings were taken by me stenographically and reduced to typewriting under my direction and that the foregoing is a true and accurate transcript of the proceedings.

I further certify that I am neither of counsel nor attorney to any of the parties involved in the proceedings, nor am I interested in the outcome of said proceedings.

Witness my hand and seal as Notary Public this 25th day of July, 1980.

/s/ Robert W. Merchant
Notary Public

My Commission Expires:
April, 1983

(Letter From Robert L. Fisher To Donald E. Thornton,
Company Exhibit A, Hearing Before Connecticut Board of
Mediation And Arbitration)

CRAVEN & ANDERSON
GENERAL CONTRACTORS
CRANE & ANDERSON CO.
1000 BROADWAY
NEW YORK 10018
TELEGRAMS: CACON
TELEPHONE: 5-5000

1000 BROADWAY
NEW YORK 10018
TELEGRAMS: CACON
TELEPHONE: 5-5000

1000 BROADWAY
NEW YORK 10018
TELEGRAMS: CACON
TELEPHONE: 5-5000

卷之二

Donald E. Thornton
Tapping River Village
Unit C-1, West Street
Litchfield, CT 06759

Dear Mr. Thorne,

You have requested that I provide you with an opinion letter respecting the effect of Connecticut General Statute Section 51-300e. That statute contains two provisions respecting limitations on scheduling of work by employers. Since you already have a copy of the statute, I will not repeat it word for word. In summary, the statute prohibits an employer from requiring an employee in commerce or industry to work more than six days in any calendar week. Secondly, employers are prohibited from requiring an employee to work on whatever day the employee states is his Sabbath. Regarding either situation, it is illegal for an employer to discriminate against an employee for

refusing to work seven days in any one week or on the employer's Sabbath.

The statute also provides that if an employee is dismissed in violation of the statute, he may appeal to the State Board of Mediation and Arbitration. The Board can order reinstatement, and the employer would be liable for a \$500 fee.

When we discussed this matter in my office, I voiced some concern about certain exceptions noted in your copy of the Labor Law. However, those exceptions, cited in CGS Section 31-7b, refer only to the statutes within that chapter. The exceptions do not apply to the Criminal Statutes, specifically to Section 53-8b(a). In other words, it is irrelevant whether or not you are professional, administrative or executive, at least with regard to the Criminal Statute. Even if that matter were at issue, I believe that you would not fall into one of the exceptions, since you work is not within any of those three categories.

In other words, it is my opinion that you are within your rights to refuse to work more than six days in any calendar week or on your Sabbath. Furthermore, if you are discharged for refusing to so work, then you can request a hearing before the State Mediation and Arbitration Board. If the Board were to rule in your favor, your employer would be required to reinstate you and could also be subject to a fine of \$250.

I trust that this opinion has been responsive to your questions. However, if you need any further information

or would care to discuss it further, please feel free to give me a call.

Very truly yours,

/s/ Robert L. Fisher, Jr.
ROBERT L. FISHER, JR.

RLF:rk

I, Jenny Myler, Secretary to the Board of Mediation and Arbitration, am the keeper of records for the Board. I certify that this is a true and attested copy of the Board's records. Dated this 23rd day of March, 1984.

Signed: /s/ Jenny Myler

JENNY MYLER
Secretary to the Board
of Mediation and Arbitration

[Excerpt from Collective Bargaining Agreement Between Retail Employees' Union Local 919 and Caldor, Inc. (Art. 7 §§ 1D and 3A] (Company Exhibit C, Hearing Before the Connecticut Board of Mediation and Arbitration)

ARTICLE 7 WORK WEEK - OVERTIME

Section 1 - D. Overtime is defined as work in excess of forty (40) hours per week, in excess of eight (8) hours per day, or in excess of five (5) days per week for all Employees. Overtime pay shall be at the rate of one and one-half (1 1/2) times the Employee's regular rate of pay. Scheduled overtime shall be rotated within the department. Employees shall not lose their turn in the rotation. When an Employee refuses overtime, it shall be counted as time worked for purposes of determining whether the Employer has complied with the provisions above. If the Employer does not have sufficient number of employees accepting the overtime, then the Employer shall require the Employees to work in reverse order of seniority; provided, however, that no Employee shall be required to report for work if working is contrary to said Employee's personal religious convictions.

Section 3 - A. Work performed by Employees on Sunday shall be considered as premium work. Such work shall be paid for at time and one-half (1 1/2) the Employee's regular rate of pay. Sunday work shall not be considered part of the basic work week. If not enough Employees volunteer for Sunday or holiday work, the Employer may then require Employees to report for work in reverse order of seniority; provided, however, that no Employee shall be required to report for work if working is contrary to said Employee's personal religious convictions.

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
JUN 5 1984
STEVENS
CLERK

No. 83-1158

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON, PETITIONER

v.

CALDOR, INC.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT**

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER**

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BEST AVAILABLE COPY

31pp

QUESTION PRESENTED

Whether a state statute that prohibits an employer from requiring employees to work on their designated day of Sabbath violates the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON, PETITIONER

v.

CALDOR, INC.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the validity of a Connecticut statute protecting the rights of private employees to refrain from working on the day they designate as their Sabbath. The Connecticut Supreme Court held the statute invalid on its face under the Establishment Clause of the United States Constitution, as applied to the states through the Fourteenth Amendment.

In 1972, Congress enacted legislation requiring employers to make "reasonable accommodations" to the religious needs of their employees, including attempting to accommodate employees' Sabbath observances. Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j) and 2000e-2(a)(1).¹

¹ In addition, guidelines issued by the Office of Federal Contract Compliance Programs of the Department of Labor impose an obligation on contractors and subcontractors on federally-assisted construction contracts to make reasonable accommodations, short of undue hardship, to the religious needs of applicants and employees.

Consequently, the United States has a substantial interest in this case. A decision upholding the Connecticut law, which goes beyond the religious accommodation requirements of Title VII, would *a fortiori* resolve the constitutionality of the federal law. Conversely, adoption of the reasoning of the Connecticut Supreme Court by other courts would, of necessity, prompt challenges to the validity of the religious accommodation requirements of Title VII.

The United States has participated as amicus curiae in three prior cases before this Court concerning the religious accommodation requirements of Title VII. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Dowey v. Reynolds Metals Co.*, 402 U.S. 689 (1971). The constitutionality of those requirements has not been resolved by this Court.²

The United States has an additional independent interest in upholding state laws that prohibit conduct that may also be unlawful under Title VII. The statutory enforcement mechanisms of Title VII evince a strong congressional policy in favor of vigorous enforcement of nondiscrimination requirements at the state level. Where a state or local law prohibits an employment practice that is made unlawful by Title VII, and establishes or authorizes a state or local authority to grant relief from such practice, no federal charges may be brought for a 60-day period. 42 U.S.C. 2000e-5(c) and (d). This enables the matter to be settled "in 'a voluntary and localized manner.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). It also enables the federal govern-

including Sabbath observance (see 41 C.F.R. 60-60.3). See also 12 C.F.R. 268.102(9)(iii) (Federal Reserve Board policy of religious accommodation); 13 C.F.R. 113.3-2 (Small Business Administration requirement of religious accommodations by recipients of federal financial assistance); 29 C.F.R. 1613.204(g) (religious accommodation obligations of federal agencies).

² See note 13, *infra*.

ment to concentrate its enforcement resources where they are most needed. The United States therefore has a substantial interest in the enforceability of state laws that parallel or supplement the requirements of Title VII.³

The United States has participated as a party or as amicus curiae in numerous cases decided by this Court under the Religion Clauses of the First Amendment. See, e.g., briefs filed by the United States as amicus curiae in *School District of Grand Rapids v. Ball*, cert. granted, No. 83-990 (Feb. 27, 1984); *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984); *Marsh v. Chambers*, No. 82-23 (July 5, 1983); *Mueller v. Allen*, No. 82-195 (June 29, 1983); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and briefs filed as a party in *United States v. Lee*, 455 U.S. 252 (1982), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

STATEMENT

Petitioner Donald E. Thornton, a Presbyterian who observed Sunday as his day of Sabbath, was employed from 1975 until March 8, 1980, as a department manager for respondent Caldor, Inc., a large chain of department stores (Pet. App. 2a-3a).⁴ Until 1977, the State of Connecticut prohibited most employers, including respondent, from doing business on Sundays. In 1976, the General Assembly enacted legislation permitting certain classes of businesses to remain open on Sundays, but (a) guaranteed all employees at least one day off per week (Conn. Gen. Stat. § 53-303e(a) (1982)), and (b) guaranteed the right of any employee who "states that a particular day of the

³ The Connecticut Board of Mediation and Arbitration is not itself designated as a qualified state agency under 42 U.S.C. 2000e-5(c) (see 29 C.F.R. 1601.80), but it could file an application for designation under the standards of 29 C.F.R. 1601.70. Many other state laws requiring religious accommodation in the workplace are administered by state agencies so designated by the Equal Employment Opportunity Commission.

⁴ Petitioner died in February 1982. This action for back pay and fringe benefits is being maintained by his estate.

week is observed as his Sabbath" not to work on that day (*id.* § 53-303e(b)). The employer is prohibited from dismissing any employee because of his "refusal to work on his Sabbath" (*ibid.*).⁸ An aggrieved employee may appeal a discharge to the State Board of Mediation and Arbitration, which is empowered to "order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position" (*id.* § 53-303e(c)).

Shortly after passage of this legislation, respondent opened its doors for business on Sundays. Under a rotation system among managerial personnel, petitioner was required to work approximately one in four Sundays. In late 1979, petitioner asserted his right under Section 53-303e(b) to refrain from working on Sundays. After several meetings with petitioner, respondent refused to give him Sundays off. Instead, respondent offered him two alternatives: a transfer to a Massachusetts store, which was not open for business on Sundays, or a demotion to a nonsupervisory capacity, with a pay cut of almost \$3.00 per hour.⁹ These alternatives were not acceptable to petitioner. He therefore ceased coming to work and filed a grievance with the Board. Pet. App. 3a.

The Board and, subsequently, the trial court held that petitioner was discharged in violation of Section 53-303e(b), and ordered reinstatement with back pay and compensation for lost fringe benefits. The Board held that it did not have authority to consider respondent's constitutional challenge to the statute (J.A. 9a-10a). The trial court expressly upheld Section 53-303e(b), commenting that "the statute enables the state to protect its citizens from the dangers of uninterrupted labor without infring-

⁸ The statute also protects applicants for employment by prohibiting employers from inquiring, as a prerequisite to employment, whether the applicant observes any Sabbath. Conn. Gen. Stat. § 53-303e(d) (1982).

⁹ The collective bargaining agreement in effect for nonsupervisory employees provided that they were not obliged to work on the Sabbath (Pet. App. 8a; J.A. 91a).

ing upon any individual's right to practice the religion of his or her choice" (Pet. App. 22a).

The Supreme Court of Connecticut reversed. Applying the three-part test first announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), the Connecticut Supreme Court held Section 53-303e(b) unconstitutional on its face under the Establishment Clause of the United States Constitution. See Pet. App. 5a, 9a.¹⁰ The court concluded, first, that the statute does not reflect a clearly secular legislative purpose. Because the employee's right under Section 53-303e(b) is expressly predicated upon a religious concept—the Sabbath—the court found that the statute had "religious overtones" (Pet. App. 12a) and that the right "comes with religious strings attached" (*id.* at 13a). The court concluded (*id.* at 14a (footnote omitted)):

The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53-303e(b) does not pass the "clear secular purpose" test of establishment clause scrutiny.

The court found, second, that the primary effect of Section 53-303e(b) is to advance religion. The court reasoned (Pet. App. 15a):

While § 53-303e(b) does not favor one religion over another, and does not provide direct aid to religious institutions in the form of money or property, it confers its "benefit" on an explicitly religious basis. Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing. Workers who do not "observe a Sabbath" may not avail themselves of the benefit provided by the subsection, and are not entitled to take a specific day off with impunity. The inescapable conclusion is that § 53-

¹⁰ The Connecticut Supreme Court expressly declined to consider whether Section 53-303e(b) is in violation of the Connecticut State Constitution. Pet. App. 11a n.7.

2000e(b) possesses the primary effect of advancing religion.

Third, the court found "most troublesome" the implications of the statute for government entanglements with religion (Pet. App. 15a). The court noted that the Board would be required to decide the scope of religious activities which "may fairly be labelled 'observance of Sabbath,'" in order to resolve the question of the sincerity of employees' Sabbath observances (Pet. App. 15a-16a).⁶ The court concluded that this analysis would be "exactly the type of 'comprehensive, discriminating and continuing state surveillance' which creates excessive governmental entanglements between church and state." *Id.* at 16a (quoting *Lemon v. Kurtzman*, 403 U.S. at 619).⁷

INTRODUCTION AND SUMMARY OF ARGUMENT

Sabbath observances are a familiar part of the religious heritage of the United States. To remember the Sabbath day and keep it holy is, to many individuals in this country, a command that takes precedence over all of the exigencies of workaday life. Since before the founding of this Republic, our laws have taken cognizance of the Sabbath, and have regulated the workplace to ensure a common day of rest and worship to the people. See *McGowen v. Maryland*, 366 U.S. 420, 431-434 (1961).⁸

⁶ The court did not explain its construction of state law on this point. On its face, Section 2000e(b) does not require any analysis of the "sincerity" of the employee's observance of the Sabbath. The statute simply requires employers to grant the day off to any "person who states that a particular day of the week is observed as his Sabbath" (emphasis added).

⁷ Associate Justice Sipes agreed with the majority that Section 2000e(b) violates the Establishment Clause, but dissented on the ground that the constitutional issue should have been reached in the first instance by the Board (Pet. App. 16a-18a).

⁸ In Connecticut, for example, laws requiring businesses to close on Sunday, the usual Christian day of Sabbath, date back to 1654. See *McGowen v. Maryland*, 366 U.S. at 543 (Appendix to Opinion of Frankfurter, J.).

In the modern era most states have come to permit economic activity to take place every day of the week, but have enacted laws to protect, to varying degrees, the rights of workers to have one day a week free from work and the rights of Sabbath observers not to be compelled by their employers to work on that day. The federal government, too, has enacted legislation that prohibits employers from taking adverse employment actions against applicants or employees on the basis of their religious observances and practices, including their observance of a Sabbath,⁹ "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j) and 2000e-2(a)(1). These governmental acknowledgments of the Sabbath, unlike the prior Sunday closing laws, leave non-Sabbath observers free to work or transact business on Sunday, and extend the benefit of a work-free Sabbath to persons who recognize the Sabbath on a day other than Sunday. At the same time, they continue to fulfill the traditional function of ensuring that most employees will not have to face the choice of "abandoning one of the precepts of [their] religion in order to accept work." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).¹⁰

⁹ The term "Sabbath," as used in Connecticut's Section 53-30a, refers to any religiously-ordained weekly day of rest and religious observance (Pet. App. 11a-12a & n.8). The right to reasonable accommodation of the employee's religious needs under Title VII likewise applies to any "conflict between work schedules and religious practice" (29 C.F.R. 1605.2(d)(1)). The right is not restricted to those who would describe their religious observance as a "Sabbath."

¹⁰ Many states have enacted statutes that, like Title VII, require employers to make accommodations to their employees' religious observances. See Ariz. Rev. Stat. Ann. §§ 41-1401(8), 41-1403 (1996); Ga. Code Ann. §§ 10-1-570, 45-19-22 (1992); Ky. Rev. Stat. §§ 344.020(8), 344.040(1), 428.140(4)(a) and (b) (1978); Md. Ann. Code art. 37, § 402 (Com. Supp. 1998); *id.* at art. 39B, §§ 14-16 (1979); Mass. Ann. Laws ch. 181B, § 4.1A (Law. Cr.

At issue here is one such state law, enacted by Connecticut when it repealed its Sunday closing law for many classes of business. The law prohibits employers from requiring employees to work more than six days per week and guarantees the right of any employee who "states that a particular day of the week is observed as his Sabbath" not to work on that day. Conn. Gen. Stat. § 53-30(a) (1982). The Connecticut Supreme Court held the Sabbath protection component of this statute invalid under the Establishment Clause of the First Amendment.

We believe this decision was in error. First, the decision is inconsistent with the precedents of this Court

op. 1978); Me. Ann. Stat. § 278.11B (Vernon 1979); N.H. Rev. Stat. Ann. § 224-A:3(4) (1985); N.Y. Exec. Law § 294.19 (McKinney 1982); Pa. Stat. Ann. tit. 43, § 903 (Purdon 1984); S.C. Code Ann. §§ 1-13-39(k), 1-13-40 (Law. Comp. 1978); Va. Code §§ 40.1-28.2, 40.1-28.3 (1982); W. Va. Code § 40-18-27 (1977); Wis. Stat. Ann. § 111.207 (West Cum. Supp. 1982).

Other state laws have been interpreted to require religious accommodation. Alaska Stat. § 18.80.200 (1982), as interpreted in *Woodall v. Alaska Wood Products*, *Per. 188 P.2d 863, 864* (Alaska 1978); Cal. Const. Art. I, § 8, as interpreted in *Randall v. Cox's on Professional Competence*, *24 Cal. 3d 167, 173-174, 133 P.2d 863, 864, 134 Cal. Rptr. 807, 911-912*, appeal dismissed for want of a substantial federal question, *444 U.S. 986* (1979); Iowa Code Ann. § 601A.6(1)(a) (West 1978), as interpreted in *Eddy v. Iowa Civil Rights Comm'n*, *334 N.W.2d 394, 402 n.1* (Iowa 1982); Me. Rev. Stat. Ann. tit. 5, § 4070(1)(A) (1979), as interpreted in *Maine Human Rights Comm'n v. Loomi* *1981*, *United Paperworkers International Union*, *385 A.2d 868, 878* (Me. 1978). See also Michigan Department of Civil Rights *et al. v. Perkins v. General Motors Corp.*, *613 Mich. 618, 317 N.W.2d 14* (1982) (interpreting Mich. Comp. Laws § 429.2003 (1982) as requiring employers to act affirmatively to avoid the discriminatory effects of employment practices that on their face are religiously neutral).

In other states, religious accommodations are required by guidance or regulation. See [State Laws] Fair Emp'l. Prac. (EPA) 403:1141 (Colo. Sept. 23, 1980); id. at 403:1708 (D.C. June 13, 1978); id. at 403:2704 (D.C. Dec. 12, 1978); id. at 403:3301 (Kan. May 1, 1978); id. at 403:3301 (Miss. July 14, 1980); id. at 403:3303 (Nev. Apr. 6, 1981); id. at 407:500-507:504 (Okla. Feb. 23, 1977); id. at 407:1704 (S.D. Dec. 18, 1978); id. at 407:1807 (Tenn. Jan. 29, 1978).

respecting Sunday closing laws and the obligations of states to accommodate Sabbath observances under unemployment compensation programs. Second, the decision erroneously reads the Constitution as prohibiting the states from accommodating the practice of religion, and fails to apply appropriate standards for evaluating the legitimacy of these accommodations. The Connecticut statute makes it possible for individuals freely to practice the religion of their choice. It does not induce or coerce that choice. It is neutral among religions, since it provides its benefits to all persons who wish to observe a Sabbath. It occasions no interference by the government in the affairs or decisions of religious institutions, or vice versa. In these respects, therefore, the statute—like Title VII and the many parallel state statutes—is a legitimate governmental regulation designed to accommodate those who wish to be free to practice their religion without incurring major unnecessary economic penalties. The only significant respect in which the Connecticut statute differs from Title VII and its parallel state statutes is that the Connecticut statute (on its face) appears to confer on workers an absolute right to refrain from Sabbath work. Whether or to what extent this verbal distinction may imply a significant practical difference from Title VII is as yet unresolved by the Connecticut courts. Whatever the resolution, we do not believe that this difference would amount to an Establishment Clause violation. In any event, this problem—if it is a problem—is not shared by Title VII.

Finally, the decision below misapprehends the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). In the context of religious accommodations, the Establishment Clause should not be interpreted in such a way as to condemn as “nonsecular” the objective of enlarging the scope for individual religious choice, or as “advancing religion” the effect of removing obstacles to religious practice. The fundamental concerns of the Religion Clauses—liberty and pluralism—are furthered, not hindered, by these accommodations.

ARGUMENT

A. Although This Court Has Not Directly Resolved The Constitutionality of Laws Requiring Employers To Accommodate the Religious Observances of Their Employees, This Court's Decisions Respecting Sunday Closing Laws and the Obligations of States To Accommodate Sabbath Observances Under Unemployment Compensation Programs Strongly Imply That Such Laws Are Valid

The religious accommodation requirements of Title VII and parallel state laws are similar in many ways to Connecticut's Section 53-303e(b). Congress' primary purpose in enacting the Title VII provision was to make it unmistakably clear that Title VII's basic prohibition against discrimination on the basis of "religion" encompasses all aspects of religious observance and practice, as well as belief, where reasonable accommodation (short of "undue hardship") is possible. Congress' attention was particularly drawn to the problem of protecting the opportunity of employees to observe their respective days of rest and worship. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); 118 Cong. Rec. 705-706 (1972).

Thus, although this Court has not resolved the question of the constitutionality of Title VII's religious accommodation requirements,¹³ it is significant that these requirements have been upheld by the three courts of appeals to decide the question. *McDaniel v. Essez International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, *supra*; *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 453-455 (7th Cir.), cert. denied,

¹³ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (case resolved on nonconstitutional grounds); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976) (affirming by an equally divided court a Sixth Circuit decision upholding constitutionality of Title VII religious accommodation requirements); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (affirming by an equally divided court a Sixth Circuit decision that Title VII, before the 1972 amendments, did not require religious accommodations).

454 U.S. 1046 (1981).¹⁴ The parallel state laws have also generally been upheld. See, e.g., *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350 (Ky. Ct. App. 1982), cert. denied, No. 82-1765 (June 20, 1983); *Rankins v. Comm'n on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979).

Moreover, two lines of cases decided by this Court strongly imply that the Connecticut statute, like Title VII and other state laws requiring religious accommodation in the workplace, is valid.

1. *Sunday closing laws*. In a series of decisions handed down the same day in 1961, this Court upheld the constitutionality of a variety of state laws forbidding commerce or labor from being conducted on Sunday. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961). A plurality of the Court reasoned, in opinions by Chief Justice Warren, that the statutes did not constitute an establishment of religion, despite their religious origins, because they served the legitimate secular purpose of enforcing a common day of rest for the community. See *McGowan*, 366 U.S. at 449-452. The plurality also found it significant that Sunday closing laws were enacted and enforced by many of the states, including Virginia, at the time the First Amendment (and its state counterparts, such as Virginia's Act for Establishing Religious Freedom) were adopted. *Id.* at 437-440.

¹⁴ Several district court decisions have gone the other way. See *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 91-92 (N.D. Ga. 1981) (dictum); *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108, 112 (N.D. Ga. 1980); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622, 626-633 (W.D. Pa. 1979), vacated on other grounds, 613 F.2d 482 (3d Cir. 1980).

In two of the decisions, *Braunfeld* and *Gallagher*, Orthodox Jewish litigants contended that the states should be required to "cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday" (*Braunfeld*, 366 U.S. at 608). Over dissents by Justices Brennan and Stewart,¹⁹ this Court did not find such exceptions constitutionally required, though the plurality opinion expressly noted that many states provide such an exception and that "this may well be the wiser solution to the problem." *Ibid.* No Justice dissented from the view that state laws permitting persons the privilege of selecting their day off on religious grounds are permissible under the Establishment Clause, even though persons with equally strong—but nonreligious—preferences are accorded no such privilege.²⁰

The Connecticut statute at issue here is constitutionally indistinguishable from the form of statute thought by the plurality in *Braunfeld* and *Gallagher* to be the "wiser solution" and by Justices Brennan and Stewart to be required by the Constitution. The only difference is that the Connecticut statute leaves non-Sabbath observers free to work or do business as they see fit on any day of the week. Thus, Sunday Sabbath observers are guaranteed their Sabbath day off, as they were under the prior regime of Sunday closing laws; observers of a Sabbath on other days have the same right to refrain from work on their Sabbath, as they would under *Braunfeld's* "wiser solution"; and non-Sabbath observers are guaranteed one day of rest but are otherwise unconstrained by the law (except insofar as they are indirectly affected by the free choices of their fellow work-

¹⁹ Justice Douglas also dissented, on broader grounds. 366 U.S. at 561-581.

²⁰ See also *Arlon's Department Store, Inc. v. Kentucky*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of those who celebrate the Sabbath on other days).

ers). If the *Braunfeld* "wiser solution" is constitutional, it would follow *a fortiori* that the Connecticut statute is constitutional as well.

The legislative history of Section 53-303e(b) reflects precisely the concerns for religious liberty and pluralism that animated this Court's opinions, including the dissents and concurrences, in the Sunday closing cases. On April 26, 1976, the Connecticut House of Representatives voted to repeal the State's Sunday closing law. Some representatives had expressed concern that some Sunday Sabbath observers might be forced by their employers to work on Sundays under the new law. See, e.g., 19 Conn. H. R. Proc. (Pt. 6), at 2415 (Apr. 21, 1976) (remarks of Rep. Webber) ("[s]ome people have expressed concern about the employees who would staff the stores that choose to open on Sundays"). Consequently, as part of the repeal, the House bill provided that "[n]o person who conscientiously believes that a particular day of the week ought to be observed as his Sabbath may be required by his employer to work on such day," and that employers would be prohibited from dismissing employees for refusing to work on their Sabbath. Conn. H. R. Substitute Bill No. 5067, § 1(b) (1976). Similar sentiments were expressed during Senate consideration of the measure. For example, Senator Hudson stated that the House bill "gives people the right not to work on the Sabbath if they choose to and I think that that is a responsible action on the part of government to guarantee those who wish to observe their Sabbath, whatever day it is, not to have to work." 19 Conn. S. Proc. (Pt. 5), at 2039-2040 (Apr. 28, 1976). See also *id.* at 2021 (remarks of Sen. Ciccarello). With slight modification, the House provision became law, although the ultimate bill, instead of repealing the Sunday closing law altogether, merely expanded the exemptions from it.²¹

²¹ The Connecticut Supreme Court subsequently struck down the remaining Sunday closing requirements in *Calder's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979). The court below

This history confirms that Connecticut has adopted a "solution to the problem" that accords maximum possible respect to the diverse beliefs and practices of the people of the State—including those who keep no Sabbath at all. Connecticut's present law was adopted against the background of the "unambiguous and unbroken" (*Marsh v. Chambers*, No. S2-23 (July 5, 1983), slip op. 9) practice of virtually every state in the Union to prohibit many or all forms of commerce and labor on the usual Christian day of Sabbath. The Connecticut successor statute at issue perpetuates this recognition of the Sabbath as "part of the fabric of our society" (*Marsh*, slip op. 9)—but does so in a manner more broadly available to adherents of minority religions and less burdensome to non-Sabbath observers. The Connecticut statute, therefore, cannot be viewed as an "establishment" of religion: for purposes of the Religion Clauses, it is substantially less problematic than the State's prior, valid, Sunday closing law.

2. Unemployment compensation programs. The Connecticut statute at issue is also supported by this Court's decisions regarding the obligations of states to accommodate Sabbath observances under unemployment compensation programs. In *Sherbert v. Verner*, 374 U.S. 398, 409-410 (1963), recently reaffirmed in *Thomas v. Review Board*, 450 U.S. 707 (1981), this Court held that extending unemployment benefits to persons who leave their jobs because they would otherwise be required to work on their Sabbath day does not violate the Establishment Clause, even where employees who voluntarily leave their jobs for nonreligious reasons would receive no such compensation. Indeed, the Court held that a state is constitutionally required under the Free Exercise Clause to extend unemployment benefits in such circumstances.

declined to address respondent's argument that Section 53-300e(b), being part of the same statute involved in *Bedding Barn*, was itself invalidated under that decision. Pet. App. 11a n.7.

These cases imply strongly that Section 53-300e(b) is constitutional. The fundamental issue there, as here, is whether the states are permitted (or required) to make special provision for the needs of workers who observe a Sabbath day. The Establishment Clause cannot be taken to prohibit Connecticut from extending to the private workplace the requirement of making the very sort of accommodation to Sabbath observance that the Free Exercise Clause was found to require of South Carolina in *Sherbert*.¹² As Justice Marshall observed in his dissenting opinion in *Texas World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90-91 (1977), "[i]f the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, * * * the State can [not] be said to establish religion by requiring employers to do the same with respect to obligations owed the employer."¹³

B. The Connecticut Statute, Like the Religious Accommodation Provision of Title VII, Is a Permissible Form of Governmental Accommodation of Individual Religious Practice

This Court has repeatedly recognized the legitimacy of governmental efforts to accommodate the practice of religion—that is, to help create conditions in which our people are free to decide whether to adopt a religious

¹² Significantly, even the dissenters in *Sherbert* and *Thomas* would find religious accommodations of this sort permissible under the Establishment Clause, although not required under the Free Exercise Clause. See *Sherbert*, 374 U.S. at 423-425 (Harlan, J., dissenting); *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting). Indeed, the opinion of the court below mirrors nearly exactly the approach to the Establishment Clause criticized by Justice Rehnquist in his *Thomas* dissent. 450 U.S. at 726.

¹³ This Court's decision in *Sherbert* and the Connecticut Supreme Court's decision here combine to create an anomalous reading of the Constitution: the State is forced to treat an employer's failure to accommodate an employee's Sabbath observance as an unjustified dismissal for purposes of paying unemployment compensation, but is unable to protect against the ensuing financial drain by treating such failure as an unlawful employment practice.

faith and to practice it if that is their choice. Indeed, in some instances, the Court has found particular forms of religious accommodation required under the Free Exercise Clause, despite the fact that the accommodation has the undeniable effect of facilitating religious practice. *Thomas v. Review Board*, *supra*; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, *supra*; see *Lynch v. Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4.

Far more common than these mandatory forms of accommodation are the many ways in which the states and the federal government, in their discretion, may ease restrictions or burdens caused by facially neutral public or private practices that make it difficult for individuals to observe their faith, or may expand opportunities for voluntary religious exercise. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring).²⁰ This Court recently described as "pervasive" the practice of "accommodation of all faiths and all forms of religious expression." *Lynch v. Donnelly*, slip op. 8. "Through this accommodation," the Court observed, quoting Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), "governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" *Lynch v. Donnelly*, slip op. 8.

The legitimacy of religious accommodations has met with widespread agreement on this Court, even as other Religion Clause questions have led to sharp divisions.

²⁰ See, e.g., *Muller v. Allen*, No. 82-195 (June 29, 1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 431 U.S. 772 (1981) (exemption of church-operated school employees from unemployment taxes); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from Labor Board jurisdiction); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption of religious objectors from compulsory military service); *Wais v. Tax Commission*, 297 U.S. 664 (1970) (property tax exemptions for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (affirmative public school release time programs); *Quick Bear v. Leupp*, 210 U.S. 59 (1908) (use of Indian trust monies for sectarian education); cf. *Widmar v. Vincent*, 434 U.S. 263 (1981) (religious group meetings on public university campuses).

Justice Brennan, for example, has stated that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh v. Chambers*, slip op. 17 (footnote omitted) (dissenting opinion); see also *McDaniel v. Paty*, 435 U.S. at 638-639 (Brennan, J., concurring). Justice Rehnquist has suggested that "governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment." *Thomas v. Review Board*, 450 U.S. at 727 (dissenting opinion). See also, e.g., *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 90-91 & n.4 (Marshall, J., dissenting); *Wisconsin v. Yoder*, 406 U.S. at 234-235 n.22 (Burger, C.J.).

The Connecticut Supreme Court did not cite any of these precedents, and its reasoning was fundamentally inconsistent with them. That court's analysis leaves no room at all for governmental efforts to accommodate private religious practice. See pages 27, *infra*. A more discriminating analysis of the issues of voluntariness, neutrality, and noninterference relevant to the purposes of the Establishment Clause,²¹ leads to the conclusion that the Connecticut statute should be upheld.

1. *Effect on voluntary religious choice.* The "constitutional underpinnings" of this nation—reflected in the First Amendment's Religion Clauses—"rest on and encourage diversity and pluralism in all areas." *Lynch v. Donnelly*, slip op. 8; see also slip op. 4 (Brennan, J., dissenting). The fundamental purpose of the Clauses is to guarantee that each person is free to adopt and practice the religion of his choice—or no religion at all—

²¹ Our discussion of the purposes of the Religion Clauses is directed, of course, to those Clauses as they have been understood to apply to the states through the Fourteenth Amendment.

without inducement or interference by the government. See *Marsh v. Chambers*, slip op. 8-9 (Brennan, J., dissenting). The first question that must be asked of legislation that touches on religion,¹⁹ therefore, is whether it merely expands the freedom available to individuals to practice a religion if they choose, or whether it induces or coerces that choice.

The Connecticut statute at issue, like other state and federal laws protecting the rights of individuals in the workplace to practice their religion without being forced to sacrifice their jobs, plainly expands the practical opportunities of Connecticut workers to observe the precepts of their faith. This Court has recognized the predicament of employees who, like petitioner, are required by their employers to work on the day observed in their faith as the Sabbath. *Sherbert v. Verner*, 374 U.S. at 404. The Connecticut statute does no more than prevent Connecticut workers from being faced with the "choice between fidelity to religious belief or cessation of work." *Thomas v. Review Board*, 450 U.S. at 717. The statute does not influence the individual's religious choice, other than to remove an extraneous obstacle to practicing the faith he has adopted.²⁰

2. *Neutrality*. "The clearest command of the Establishment Clause," this Court has stated, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); see *Gillette v. United States*, 401 U.S. 437, 449 (1971). One important aspect of neutrality is that the government not "confer any imprimatur of state approval on any religious sects or practices." *Widmar v. Vincent*, 454 U.S. at 274; see also *Lynch v. Donnelly*, slip op. 4

¹⁹ Governmental programs that involve the expenditure of tax monies for the benefit of religious institutions raise somewhat different and additional concerns. See page 28, infra.

²⁰ It cannot realistically be thought that the provision confers an inducement to religious practice so valuable that employees would be likely to adopt a Sabbath-observing faith in order to share in the benefit.

(O'Connor, J., concurring). As the opinion in *Zorach v. Clausen*, *supra*, makes clear, this obligation of "neutrality" when it comes to competition between sects" (343 U.S. at 314) applies no less to governmental accommodations to religion than to other laws and programs bearing on religion. Thus, a governmental accommodation to religion might well be invalid if it discriminated among religions or if it amounted to an endorsement of a particular religion.

The benefits of the Connecticut statute are equally available to adherents of any of a multitude of religious denominations and sects, including the Protestant, Roman Catholic, Jewish, and Islamic faiths that predominate in the United States today. As the court below acknowledged (Pet. App. 15a), Section 53-303e(b) "does not favor one religion over another." It certainly cannot be said that the statute "conveys a message of endorsement or disapproval" (*Lynch v. Donnelly*, slip op. 4 (O'Connor, J., concurring)) of any particular religious faith or practice. It no more "endorses" the observance of a Sabbath than exemptions from compulsory military service "endorse" pacifism, or off-premises release time programs "endorse" religious education. Rather, the statute is "simply a tolerable acknowledgment of beliefs widely held among the people of this country" (*Marsh v. Chambers*, slip op. 9). It "endorses" only the view that individuals should be able to practice their religion in accordance with their own convictions, without undue economic pressure or penalty.²¹

The statute does not, of course, benefit all persons equally. In the nature of things, when the state seeks to accommodate those with religious beliefs, the accommodation will tend to be irrelevant to those who have no reli-

²¹ It is also significant that the Sabbath is not the only commonly observed practice protected under this Connecticut law. The statute also guarantees workers the right to a day off on such secular holidays as New Year's Day, Memorial Day, and Independence Day, as well as on Christmas and Thanksgiving. Conn. Gen. Stat. § 53-303b (1982).

gious beliefs. Accordingly, the concern of the Connecticut Supreme Court (*Pet. App.* 15a), that "(w)orkers who do not 'observe a Sabbath' may not avail themselves of the benefit provided by [Section 53-303e(b)], and are not entitled to take a specific day off with impunity," is misplaced. In keeping with the special status of religion under the Free Exercise Clause, the government may seek to accommodate or protect religiously motivated claims of conscience even where it does not accord the same treatment to other strongly-held beliefs (*Mosk v. Chambers*, slip op. 17-18 (Brennan, J., dissenting)); and the government may legitimately take cognizance of the fact that religious faith places some persons under obligations and difficulties not faced by their fellow citizens. See *Gillette v. United States*, 401 U.S. at 453; *Zorach v. Clausen*, 343 U.S. at 313-314; *McDaniel v. Pate*, 435 U.S. at 638-639 (Brennan, J., concurring); *Sherbert v. Verner*, 374 U.S. at 422 (Harlan, J., dissenting). Thus, here, all workers are guaranteed a day of rest; but only those whose religious convictions require it are given the right to designate their day of rest.

3. Noninterference between church and state. Although "total separation" between church and state "is not possible in an absolute sense" (*Lemon v. Kurtzman*, 403 U.S. at 614), one of the purposes of the Religion Clauses is "to prevent, as far as possible, the intrusion of either into the precincts of the other" (*ibid.*). In Justice Brennan's words, this purpose is "to keep the state from interfering in the essential autonomy of religious life." *Mosk v. Chambers*, slip op. 9 (dissenting opinion). Such interference can take one of two forms: a religious institution may assume decisions or functions proper, belonging to the state, or the government may "take[e] upon itself the decision of religious issues, or * * * unduly involv[e] itself in the supervision of religious institutions or officials." *ibid.* (footnotes omitted). See *Larkin v. Grindel's Den, Inc.*, 459 U.S. 116 (1982); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

Here there is no danger whatever of intrusion by the State into church affairs or vice versa. Section

53-303e(b) entails no contact between religious and governmental authorities. Compliance is initially negotiated between workers and their employers, with mandatory arbitration in the event the employee is dissatisfied with the outcome. Religious authorities are not involved in the process; nor is the government called upon to make religious decisions or to assume jurisdiction over religious institutions or officials.

4. Extent of burden to the employer under Title VII and the Connecticut statute. In each of these respects—voluntariness, neutrality, and noninterference—the Connecticut statute is virtually identical to the religious accommodation provisions of Title VII and parallel state laws in many other states.¹² In one important respect, however, the Connecticut statute may be distinguishable from Title VII and parallel state provisions: Title VII does not create an absolute right to observance of the Sabbath; it merely requires the employer reasonably to accommodate the employee's Sabbath observance if it can do so without "undue hardship." See *TWA World Airlines, Inc. v. Hardison*, *supra*.¹³ Section 53-303e(b) may go further. On its face it allows employees as a matter of legal right to refrain from working on their Sabbath day, and to be free from the threat of discharge for so doing. Whether or to what extent this verbal distinction implies a substantial practical difference in the burdens placed on the employer by Section 53-303e(b) has not been addressed by the Connecticut courts, and the rationale of the decision below is not predicated on any such difference.¹⁴ Nonetheless, assuming that the burden

¹² See note 12, *supra*.

¹³ We take no position, of course, on whether petitioner's constructive discharge would constitute an unlawful employment practice under Title VII. The answer to that question would hinge upon whether an accommodation to petitioner's Sabbath observance would be reasonable and could be made without "undue hardship" to respondent's business. See *Blutarsky v. Smith Steel Workers*, 645 F.2d at 432.

¹⁴ It is not possible to determine on the basis of this record how much implied feasibility may exist in the Connecticut statute. In

placed on the employer by the Connecticut statute is greater than the burden entailed by Title VII's religious accommodation requirements, the question may be posed whether the more absolute character of Connecticut's Section 53-303e(b) is cause for constitutional concern under the Establishment Clause. We think that it is not.

To be sure, some may contend that Connecticut's approach does not reflect wise social policy; that it places too high a premium on the rights of religious observance to the detriment of other, economic, values. Congress and

In argument before the Board, respondent did not seek any limiting construction of the statute, or suggest that its proposed accommodations to petitioner (the transfer to a Massachusetts store or to a non-supervisory position) might have satisfied the statutory requirement. Respondent instead argued that Section 53-303e(b) provides "absolute no defense for the employer" (J.A. 81a) and attacked its facial constitutionality. For obvious reasons, this interpretation was not challenged by petitioner. It was on this basis that the Board held respondent in violation of the statute. The Connecticut Supreme Court, in turn, assumed jurisdiction only to decide the question of facial validity (Pet. App. 9a), and deferred without consideration on the merits to the Board's conclusion that respondent was in violation of the statute.

As the circumstances of this case illustrate, it is not at all clear how "absolute" the Connecticut statute is. Petitioner was not expressly discharged for refusal to work on his Sabbath, but instead resigned when he decided that he could not accept respondent's counter-offer. The Board ruled that his resignation was legally tantamount to a discharge (J.A. 11a), a determination that, under state law, was unreviewable by the courts (Pet. App. 1a n.4). However, any determination that a resignation is constructively a discharge must necessarily rest on a conclusion that the employee's actions formed the resignation. Such a conclusion implies that respondent's proposed accommodations were found insufficient here, but does not imply that all proposed accommodations would be deemed insufficient as a matter of law. It is difficult to believe, for example, that the Board would have considered petitioner constructively discharged if he had been offered, and refused, a transfer to an equivalent store in the same position.

In the posture of this case, therefore, respondent should not be heard to complain that Section 53-303e(b) is unconstitutional because it is "absolute." That was not the ground for the Connecticut Supreme Court's judgment, and as a construction of state law, is purely an artifact of respondent's own litigation strategy.

the states that have chosen to adopt a more flexible form of religious accommodation appear to have come to this conclusion. However, any lesser degree of flexibility in the Connecticut statute does not violate the Establishment Clause. Certainly, no one's religious rights or interests are infringed by the statute. Respondent does not contend that it is required to take any measures that it considers religiously offensive. Respondent's sole concern is that its costs of doing business are increased by the obligation to accommodate the Sabbath observances of its employees.

We do not know, and the record does not reveal, how costly compliance with the Connecticut statute would be for respondent. It may be significant, however, that respondent has bargained with its nonsupervisory employees to grant them a contractual right not to work on Sunday if it would violate their "personal religious convictions." J.A. 91a. The Connecticut statute, therefore, merely extends to all employees a privilege respondent has been willing to provide to its nonsupervisory employees. This suggests that it is unlikely that respondent could prove that the costs of compliance are excessive as a constitutional matter (*cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 90 & n.3 (Marshall, J., dissenting)). In any event, such considerations should not be heard in the context of a challenge to the facial validity of the statute.²⁸

More fundamentally, we believe that—once it is established that a given form of religious accommodation is permissible in principle and that no religious interest of opposing parties is infringed—issues of degree of cost are properly resolved by the legislative branch. Employ-

²⁸ Had respondent not chosen to challenge the validity of Section 53-303e(b) on its face, it apparently might have been required, under state law, to submit its constitutional claims to the Board of Arbitration and Mediation. See Pet. App. 9a & n.6. Having selected the procedural alternative that it did, respondent may not now rely on arguments concerning the validity of the statute as applied.

ers like respondent have no difficulty in making their voices heard in the legislatures, and the legislatures can be expected to be responsive to legitimate claims that state laws impose excessive costs and burdens on employment.

In the area of religious accommodation, between the constitutional demands of the Free Exercise Clause and the constitutional prohibitions of the Establishment Clause, there is a wide scope for legislative discretion—"room for play in the joints" (*Walz*, 397 U.S. at 669)—within which economic cost and efficiency may be balanced against competing claims of religious accommodation. See *United States v. Lee*, 455 U.S. 252, 259-261 (1982). There is no fixed constitutional rule that would enable courts to determine what level of costs is too high. If the less onerous requirements of Title VII and parallel state statutes are constitutionally permissible, as we believe and most courts have held, we do not see why the somewhat greater costs of compliance with the more absolute requirements of Section 53-303e(b) would be beyond the pale.

Nonetheless, we submit that even if this Court were to conclude that the Connecticut statute goes too far—that a State may not adopt a *per se* rule requiring its employers to subordinate other business interests to the religious observances of their employees—Title VII and the parallel state statutes would remain constitutional. If there is a constitutional defect in Section 53-303e(b), it is its absolute character—a character that Title VII and the parallel state statutes do not share.

C. The Connecticut Supreme Court's Use of the Three-Part Test of *Lemon v. Kurtzman* Would Invalidate All Forms of Religious Accommodation and Subvert the Values of the Free Exercise Clause

The decision of the Connecticut Supreme Court applies the *Lemon* test where it should not apply, and does so in a manner that conflicts with this Court's religious accommodation decisions and the values of the Free Exercise Clause.

1. Purpose and Effect. In *Lemon v. Kurtzman*, *supra*, the "purpose" and "effect" factors were put forward as a means for evaluating the constitutionality of government programs of financial assistance, direct or indirect, to religious institutions. See also *Mueller v. Allen*, *supra*; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). In that context, they bear an obvious and direct relationship to the purposes of the Establishment Clause. One of the original purposes of the Clause was to prohibit the government from imposing taxes for the support of religious institutions. J. Madison, *Memorial and Remonstrance*, 2 Writings of James Madison 183 (G. Hunt, ed. 1910); Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia (1823); see *Everson v. Board of Education*, 330 U.S. 1, 11-16 (1947). Taxation is inherently coercive; and the State may not use coercion to exact support for religious institutions or practices. Yet, as numerous cases in this Court illustrate, the government often uses tax monies for general public welfare purposes, wholly without reference to religious considerations, and some of the funds may benefit religious institutions, directly or indirectly. See, e.g., *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Bradfield v. Roberts*, 175 U.S. 291 (1899). In such instances, the government does not purport to defend its practice on the ground that it would accommodate or facilitate the exercise of religion, but on the ground that the purpose of the program is secular and that any effect of benefit to religion is indirect, remote, or incidental.²⁹

The purpose and effect inquiries can also have coherence and relevance in other circumstances where the government program under challenge is sought to be justified, not on the basis that it is a legitimate acknowledgment of religion, but on the basis that the interaction of the program with religion or religious institutions is secondary or adventitious. See, e.g., *Widmar v. Vincent*, 454

²⁹ Some governmental practices can be defended on alternative theories: religious accommodation on the one hand, or secular purpose and effect, on the other. E.g., *Mueller v. Allen*, *supra*; *Gillette*, 401 U.S. at 452-53.

U.S. at 273-275 (benefit of religious group access to university facilities incidental to university's interest in maintaining open forums); *McGouan v. Maryland*, *supra* (benefit of Sunday closing laws to persons who observe the Sabbath on Sundays incidental to governmental interest in promoting a common day of rest).

Where the very purpose of the challenged program is to accommodate private religious beliefs and to make it possible for our people to exercise their religion, the purpose and effect inquiries seem less apt. These inquiries—designed to determine whether religious considerations have infused areas or affected decisions where they do not belong—are not logically related to determining whether, in circumstances where some religious acknowledgment or accommodation may be appropriate or even required, the particular governmental practice at issue is permissible. See *Thomas v. Review Board*, 450 U.S. at 726 (Rehnquist, J., dissenting); *Sherbert*, 374 U.S. at 416-417 (Stewart, J., concurring). The purpose and effect inquiries consequently may seem artificial—even circular—in the context of religious accommodations, where the government's action, by definition, explicitly turns on considerations of religion.

In one sense, to take steps to facilitate the free exercise of religion—as by requiring the accommodation of Sabbath observers or by providing military chaplains—can always be characterized as having a “nonsecular” purpose. But in another (larger) sense, to create a society in which people are free to follow the tenets of their faiths without extraneous penalty or difficulty is a truly secular purpose, one to which many nonbelievers are devoted.²⁰ Similarly, the effect of such steps is always—by definition—to aid the practice of religion; but, again,

²⁰ The difficulty with the word “secular” is that one of its connotations suggests an affirmative hostility to religion that the Establishment Clause does not contemplate. See, e.g., Webster's Third New International Dictionary 2063 (1976) (defining “secularism” as “a view of life or of any particular matter based on the premise that religion and religious considerations should be ignored or pernicious excluded”).

the larger effect is to create a certain sort of society, one in which free exercise can “flourish according the zeal of [each group's] adherents and the appeal of its dogma.” *Zorach v. Clauson*, 343 U.S. at 313.

The “purpose” and “effect” tests can, therefore, lay a semantic trap, which litigants can manipulate at will to make all forms of religious accommodation—or none—appear to violate the Establishment Clause. The court below fell exactly into such a trap. It concluded that the very purpose of accommodating religious practices, being “nonsecular,” is impermissible. See Pet. App. 14a (footnote omitted):

The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53-303e(b) does not pass the “clear secular purpose” test of establishment.

The fallacy in this reasoning is apparent: one might use precisely the same words to describe the *Free Exercise Clause* itself. The unmistakable purpose of that Clause, too, is to allow those persons who wish to worship the freedom to do so. The touchstones of the Religion Clauses are liberty and pluralism, not secularism.

Similarly, to ask whether a statute or program “advances” religion is to obscure the question whether it induces or coerces—rather than accommodates or facilitates—a religious practice. All religious accommodations “advance religion” in the sense that their effect is to relieve the burden on religious observance that facially neutral rules or practices would otherwise impose. *Wisconsin v. Yoder*, *supra*; *Gillette v. United States*, *supra*; *Sherbert v. Verner*, *supra*; *Zorach v. Clauson*, *supra*. The Connecticut Supreme Court's observation (Pet. App. 15a) that Section 53-303e(b) “confers its ‘benefit’ on an explicitly religious basis,” is, therefore, no more than a truism. It does not establish that the statute's effect is inconsistent with the values of the Establishment Clause.²¹

²¹ To the extent that the purpose and effect concepts are understood as no more than the subjective and objective aspects of de-

2. *Entanglement.* The concept of excessive governmental "entanglement" with religion is rooted in the need to prevent undue state interference with religious institutions, and vice versa. It does not give license to invalidate any scheme or program merely because both government and religion are involved. A challenging party must show that the program involves contacts between governmental and religious authorities that create a genuine danger to the "essential autonomy of religious life." *Marsh v. Chambers*, slip op. 9 (Brennan, J., dissenting); see *Weis*, 397 U.S. at 678. Where, as here, implementation of the statute occasions no contact between governmental and religious authorities, but only the possibility of interaction between the state and its citizens, there is no danger of excessive entanglement.²⁰

The Connecticut Supreme Court found "most troublesome" (Pet. App. 15a) the potential of the challenged statute for governmental entanglement with religion. The basis for the court's conclusion, however—that the State would be required to plumb the sincerity of employees' Sabbath observances—is totally without foundation. Even putting aside the fact that the Connecticut statute on its face requires no such inquiry (see note 8, *infra*), this Court has consistently rejected the notion that the necessity for an inquiry into the sincerity (as opposed to the verity) of an individual's religious beliefs is fatal to a

terminating whether the practice under review "conveys a message of endorsement or disapproval" of a religious belief or practice (see *Lynch v. Donnelly*, slip op. 4 (O'Connor, J., concurring)). They are a necessary part of the "neutrality" inquiry. See pages 18-19, *infra*.

²⁰ The entanglement inquiry focuses on religious institutions rather than individuals. This is clear not only from its purpose and relation to Establishment Clause values, but also from the considerations ordinarily examined to determine whether a given program entails excessive entanglement. These factors are: "the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 402 U.S. at 615 (emphasis added); see *Burner v. Board of Public Works*, 426 U.S. 736, 742-744 (1976).

governmental accommodation of religion. E.g., *Thomas v. Review Board*, 450 U.S. at 713-716; *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Bellard*, 322 U.S. 78 (1944). Indeed, the problem is conceptually identical to that of identifying religious objectors to military service—a classic case of legitimate accommodation. See *Gillette v. United States*, *infra*.²¹

The decision below is an ideal example of how the elements of the *Lemon* test, applied without regard to their context or relation to the purposes of the Religion Clauses, can distort, rather than inform, analysis. The Connecticut Supreme Court has made the Establishment Clause an instrument of hostility toward religious toleration. There is no one all-encompassing "test" to discern a law respecting an establishment of religion (*Lynch v. Donnelly*, slip op. 9). There is, however, a fair test for discerning when a court's interpretation has gone awry: when the effect of the decision is to deny the right of the people to extend the courtesy of toleration and accommodation to those whose ability to practice their faith may conflict unmercifully with the demands of the world.

Laws such as Title VII and Connecticut's Section 53-303e(b) reflect, we believe, an admirable tolerance for the diversity of religious practices in this country and a willingness to enable religious believers—particularly those of minority views—to overcome the burdens their religious observances would otherwise place on them in the workplace. *Tenby v. Martin-Marietta Corp.*, 648 F.2d at 1244-1245. As Justice Marshall has stated, "our hospitality to religious diversity"—as reflected in such statutes—is "one of this Nation's pillars of strength." *Harden*, 432 U.S. at 97. In enacting and enforcing this statute, the State of Connecticut plainly is not "fostering the 'establishment'" of petitioner's Presbyterian faith or of any other religion (*Sherbert v. Verner*, 374 U.S. at

²¹ In his dissenting opinion in *Brownfield v. Brown*, 360 U.S. at 615, Justice Brennan described an argument identical to that relied on by the court below as "legally besides" and contrary to precedent.

409). On the contrary, statutes such as these increase the freedom of individuals to practice the faith of their own choosing, without in any way constituting a governmental endorsement of religion or constraining the freedom of those who wish not to practice any religion at all. As such, they exemplify, rather than violate, the ideals of the Free Exercise and Establishment Clauses.

CONCLUSION

The judgment of the Supreme Court of Connecticut should be reversed.

Respectfully submitted,

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JUNE 1984

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

U.S. Supreme Court, U.S.
FILED

NOV 1 1984

ALEXANDER L. STEPHAN,
CLERK

ESTATE OF DONALD E. THORNTON,

Petitioner,

STATE OF CONNECTICUT,

Intervenor,

—v.—

CALDON, INC.,

Respondent.

ON A WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

**THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN JEWISH COMMITTEE FOR
LEAVE TO FILE AND BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONER**

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In the
Supreme Court of the United States
October Term, 1983

ESTATE OF DONALD E. THURSTON,
Petitioner

STATE OF CONNECTICUT,
Intervenor
v.

CALDON, INC.,
Respondent

On a Petition for Certiorari to the Supreme
Court of Connecticut

Motion of the American Civil Liberties Union
and the American Jewish Committee
for Leave to File a Brief Amici Curiae
in Support of Petitioner

The American Civil Liberties Union and
the American Jewish Committee respectfully
move for leave to file the attached brief
amicus curiae in this case.

The American Civil Liberties Union is a

nationwide, non-partisan organization of over 350,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU is committed to preserving both the individual freedom to worship and the principle of government neutrality in matters of religion embodied in the two religion clauses of the First Amendment.

The American Jewish Committee, a national organization of approximately 10,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of this organization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and

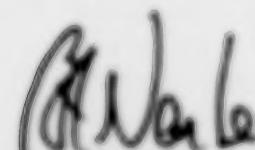
government. At the same time, it supports with equal force the First Amendment principle of free exercise of religion, including the freedom to abstain from work on one's Sabbath. The concern in the case at bar is to strike a proper balance between these two premier, yet sometimes conflicting, principles.

This case poses a potential clash between government action designed to enhance the capacity for free exercise of religion and the requirement of government neutrality toward religion imposed by the Establishment Clause. Amici believe that the core of both the Free Exercise and the Establishment Clauses is respected and advanced by statutes requiring private employers to seek to accommodate the religious practices of their employees whenever reasonably possible. When, however, a statute requires a private

employer to defer to the religious practices of employees regardless of cost or consequences to the employer or to co-workers, the statute is capable of application in settings that would violate the Establishment Clause. Since, on the inadequate record in this case, it is impossible to determine whether reasonable accommodation of the employee's religious practices was attempted or possible, amici urge the Court to vacate the decision of the Supreme Court of Connecticut and to remand for a determination as to whether, on the facts of this case, requiring deference to the religious practices of Mr. Thornton would have imposed such an undue burden upon his employer or his co-workers as to constitute a violation of the Establishment Clause. Petitioner and intervenor have consented to the filing of this brief amici

curiae. Respondent has declined to grant consent.

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QUESTIONS PRESENTED

1. May Connecticut impose an absolute rule requiring employers to permit an employee to refrain from working on his or her religious Sabbath regardless of the impact upon an employer's business and regardless of the effect on co-workers?

2. Should this case be remanded to determine whether reasonable accommodation of an employee's religious practices was possible without imposing undue burdens on his employer or his co-workers?

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INTEREST OF AMICI

The interests of amici are set forth in the motion for leave to file this brief amicus curiae, which is appended hereto.

STATEMENT OF THE CASE

Donald Thornton was a managerial employee of Caldor, Inc. Pursuant to Caldor policy, he was required to work on Sundays in accordance with rotation schedules established by the store. In November, 1979 he made a written request to be excused from Sunday work for religious reasons* -- because he observed that day as his Sabbath.

Caldor refused Thornton's request. However, as an alternative, Caldor offered either (i) to transfer him to a store in a different state which remained closed on

* Prior to his November, 1979 request to be excused from Sunday work, Thornton worked on more than 30 Sundays, apparently because he did not know he had any right to refuse.

sundays, or (ii) to demote him from a manager to a regular employee at a substantially reduced salary, but allowing him in that diminished capacity to be relieved of Sunday work. The record does not indicate why Calder refused to accommodate Thornton's request to be excused from Sunday work. Apparently, no attempt was made below to gauge the precise nature of the dislocation which would have been caused or the extent to which co-workers would have been affected.

Thornton refused Calder's offer. He then declined to report for work on Calder's terms and filed a grievance with the State Board of Mediation. After full hearing and argument, the Board concluded, first, that "Mr. Thornton had justified to the panel that, in fact, his Sundays were his day of Sabbath." Second, the Board determined that "(i) in the opinion of the majority of the panel, Calder discharged Mr. Thornton as a

management employee for refusing to work Sundays, which day was Mr. Thornton's day of Sabbath."

Finally, the Board held that such discharge violated Conn. Stat. § 53-303(e) which provides in pertinent part:

"(b) no person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."

Calder challenged the Board's determination in state court, arguing both that (i) its decision was factually incorrect in concluding that Thornton was "discharged" within the meaning of § 53-303(e); and (ii) that, in any event, § 53-303(e) was an unconstitutional establishment of religion in violation of the First Amendment. The Connecticut Supreme Court sustained Calder's Establishment Clause claim and declared the statute unconstitutional. Calder v. Int'l. T.

Ferguson, 191 Conn. 336 (1983). The Connecticut courts did not make any factual determination regarding the reasonableness of Calder's efforts to accommodate Thornton's request to be excused from work on his Sabbath, or the burdens suffered by Calder if required to honor that request as made.

PURPOSE OF ACCOMMODATION

This case involves a sensitive and difficult issue not previously decided by the Court directly: to what extent, and in what circumstances, may the state affirmatively act to protect the free exercise of religion in the private employment sector without offending the Establishment Clause? Clearly, the two competing values -- creating a societal environment that permits the unrestricted practice of religion when an individual so chooses, while preventing the

emergence of a governmental system promoting religion over other individual choices -- are both fundamental values of our constitutional democracy.

While this Court has never explicitly decided the question, a requirement that an employer "reasonably accommodate" the religious needs of employees would appear to satisfy Establishment Clause standards. Cf. TWA v Hardison, 423 U.S. 63 (1977). On the other hand, an absolute statutory command that a private employer defer to the religious interests of employees regardless of the cost to the employer or consequences to other employees would be capable of unconstitutional applications under both the Establishment and Due Process Clauses.

The Connecticut Supreme Court construed § 53-303(e) as requiring absolute deference by employers to the religious interests of employee Sabbath observers and ruled that

such an absolute statute violated the Establishment Clause. Since the Connecticut Supreme Court elected to review the statute on its face, it did not explore whether Caldor, Inc. had, in fact, attempted a reasonable accommodation of Thornton's religious beliefs. Similarly, the Connecticut courts made no findings on the cost or consequences to Caldor, Inc., or to Thornton's co-employees, of deferring to Thornton's religious beliefs.

Such a facial review technique is clearly justified in many settings where it preserves constitutional values from erosion or attack. However, where, as here, the mere existence of the statute posed no danger to the vigorous enjoyment of constitutional values, little basis existed for utilizing a facial review technique which forced the Connecticut Court to decide an unnecessary and difficult constitutional question in the

absence of adequate factual development.

Accordingly, amici urge the Court to vacate the decision below as an inappropriate exercise of facial review and to remand for an "as applied" exploration of whether a reasonable accommodation was possible between Caldor's employment needs and Thornton's religious beliefs or whether deferring to Thornton's religious practices would have imposed undue burdens on his employer or his co-workers. Only if no reasonable accommodation was possible will it be necessary to determine whether the burdens imposed by § 53-303(e) in this case are so substantial as to violate the Establishment Clause.

1. WHILE A STATUTE MANDATING AN EMPLOYER TO TAKE REASONABLE STEPS TO ACCOMMODATE THE RELIGIOUS BELIEFS OF EMPLOYEES DOES NOT VIOLATE CONSTITUTIONAL STANDARDS, AN ABSOLUTE COMMAND THAT A PRIVATE EMPLOYER DEFER TO THE SABBATH VIEWS OF EMPLOYEES WITHOUT REGARD TO COST OR

CONSEQUENCES IS CAPABLE OF
UNCONSTITUTIONAL APPLICATION
UNDER THE ESTABLISHMENT AND
DUE PROCESS CLAUSES.

The Court has repeatedly noted the unavoidable tension existing between the two great religion clauses of the First Amendment. The twin imperatives of government neutrality toward religion and individual freedom to engage in religious activity inevitably come into conflict when a benevolent state attempts to assist individuals seeking to engage in religious activity. When, for example, government has sought to assist private worship by (1) delegating zoning power to private religious groups; (2) displaying overtly religious symbols; or (3) directly subsidizing religious activity, the Court has invalidated the government initiatives as violative of the principle of religious neutrality codified in the Establishment Clause. Larkin v. Grendel's Den, 74 L.Ed.2d 297 (1982);

Stone v. Graham, 449 U.S. 39 (1980); Widmar v. Walther, 433 U.S. 229 (1977).¹ When, however, government has sought to provide religious institutions with a form of indirect assistance of a kind offered to analogous secular activity, the Court has upheld the practice. See, e.g., Wall v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions to broad range of organizations, including churches); Mueller v. Allen, 77 L.Ed.2d 721 (1983) (tax credits available to parents of children in public and private schools); Widmar v. Vincent, 454 U.S. 263 (1981) (access to university facilities open for secular activity). The precise line dividing legitimate from unconstitutional

¹ Lynch v. Donnelly, U.S. ___ (1984), narrowly upheld the display of a creche as part of an overwhelmingly secular display involving colored lights, plastic animals and Santas. A majority of the Court ruled that the display, taken as a whole, did not constitute an endorsement of religion and, thus, did not violate the Establishment Clause.

government action favorably affecting private religious activity is, thus, a notoriously difficult one to draw.

Where the impediment to individual religious activity is traceable to the State itself, the Court has recognized that the Free Exercise Clause often compels -- and the Establishment Clause certainly does not forbid -- government action designed to remove or to mitigate such state-imposed impediments. Thus, where a government-mandated system of compulsory education poses obstacles to deeply held religious beliefs, believers are guaranteed an opportunity to send their children to privately financed religious schools or, in rare situations, to refrain from schooling altogether. See generally Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972). Similarly, a public system of unemployment compensation that provides no

benefits to persons who voluntarily refrain from work may not deny coverage to an employee whose resignation was precipitated by sincere religious convictions. Sherbert v. Werner, 374 U.S. 398 (1963); Thomas v. Review Board, 430 U.S. 387 (1981). See also, e.g., In re Jenison, 245 Minn. 94, 120 N.W. 2d 515 (1963), vacated and remanded, 375 U.S. 14 (1963), on remand, 267 Minn. 134, 125 N.W. 2d 588 (1963); United States v. Jeffer, 380 U.S. 163 (1965); Nelis v. United States, 398 U.S. 333 (1970). But see United States v. Lee, 433 U.S. 292 (1982). Thus, the principle of "accommodation" has been properly invoked by the Court to resolve the conflict between a state-created program and an individual's religious beliefs. Indeed, it is the very fact of that state-created conflict which the Court has relied upon to justify such favored treatment of religion despite "the danger that an exception from a

general obligation of citizenship on religious grounds may run afoul of the Establishment Clause". Wisconsin v. Yoder, supra at 220-21.²

Where the obstacle to unconstrained individual religious activity flows, not from

² Where no such conflict exists -- that is, where a government act does not force a religious person to a choice between adherence to secular or sectarian authority -- then to grant special privilege to religion would, indeed, violate the Establishment Clause. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (where a student religious club was permitted the use of university facilities only because all other non-religious clubs are permitted such use); Abington School District v. Schempp, 374 U.S. 203 (1963) (emphasizing the importance of government neutrality not only between religious sects but as to the advancement of religion, generally). Thus, for example, efforts to rationalize the incorporation of "prayer" or "religion" into the public school curriculum on Free Exercise grounds have been rejected, in part because there is no need for any "accommodation" since every student and teacher always retains the right to pray privately at any time, and therefore neutrality does not create a conflict with any person's religious beliefs. Abington v. Schempp, 374 U.S. at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs"); Treen v. Karen B., 455 U.S. 913 (1982); Stone v. Graham, 449 U.S. 39 (1980).

government mandated duties, but from legitimate private decisions which conflict with individual religious desires, the issue is not whether the government may (or must) remove state-imposed obstacles to religious freedom, but whether government may require one private party to subordinate substantial and legitimate secular interests to the religious beliefs of another.

When, as in the Title VII context, legislation requires employer deference to employee religious practices in the absence of a showing of business necessity,³ no serious constitutional problem is posed.

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³ The business necessity standard utilized by Title VII is arrived at by the roundabout route of forbidding employment discrimination on the basis of religion, but limiting coverage if "an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e-(2)(a)(1); 2000e(j)

F.2d 1239 (9th Cir. 1981) See TWA v. Hardison, 432 U.S. 63 (1977). See also Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247 (9th Cir. 1981); Nottelson v. A.O. Smith Corp., 489 F.Supp. 94 (E.D.Wisc. 1980); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd mem. by equally divided court, 429 U.S. 65 (1976).⁴ To the extent private

⁴ The 1972 Amendment to Title VII requiring an employer to reasonably accommodate an employee's religious practices was enacted to reverse Dewe v. Reynolds Co., 429 F.2d 324 (6th Cir. 1970), aff'd by equally divided Court, 402 U.S. 689 (1971) (affirming dismissal of employee for refusing to work on Saturday). Since its enactment, courts have generally held that refusal to permit employees time-off on their Sabbath violates the reasonable accommodation requirement in the absence of a showing of hardship to the employer or to co-workers. See, e.g. Riley v. Bendix Corp., 30 F.Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972); Young v. Southwestern Saving & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975); Dixon v. Omaha Public Power District, 385 F.Supp. 1382 (D.Neb. 1974); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd by equally divided court, 429 U.S. 65 (1976). See generally Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976); Draper v. U.S. Pipe & Foundry, 527 F.2d 515 (6th Cir. 1975), cert. den., 433 U.S. 908 (1976); Niederhuber v. Camden County, 495 F.Supp. 273 (D.N.J. 1980); [cont'd. on next pg]

activity interferes with the enjoyment of religious freedom without substantial or legitimate justification, no serious constitutional obstacle exists to a government response designed to free a religious individual from arbitrary or unreasonable private interference with the enjoyment of religious liberty. Just as state-created obstacles to religious conscience may be eliminated without violating the Establishment Clause, see, e.g., Wisconsin v. Yoder, supra, so may arbitrary and unreasonable private obstacles. Indeed, where a private restraint on religious freedom is arbitrary or unreasonable, a statutory insistence that the restraint be lifted imposes no costs and

Kendall v. United Air Lines, Inc., 494 F.Supp. 1380 (N.D. Ill. 1980). For a general description, see Ritter, The Rise and Fall of Title VII's Requirement of Reasonable Accommodation of Religious Employees, 11 Colum. Hum. Rts. L. Rev. 63 (1979); Comment, 62 Va. L. Rev. 237 (1976).

trumps no secular values.⁵

When, however, a privately imposed impediment to religious observance is rooted in substantial and legitimate secular considerations, it is a far more troublesome question whether the state may sweep aside such legitimate secular considerations in order to advance the religious interests of Sabbath observers without violating the principle of neutrality toward religion. The ultimate conceptual problem raised by this case, therefore, is whether a statute which seeks to advance the free exercise interests of Sabbath observers by assuring them their Sabbath off regardless of the strength of the

⁵ In an analogous setting, the Court has experienced little difficulty in rejecting insubstantial claims that fair employment and public accommodation statutes violate guarantees of free association. See, e.g., Hishon v. King & Spaulding, U.S. (1984); Norwood v. Harrison, 413 U.S. 455 (1973); Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945). See Gomez-Bethke v. United States Jaycees, No. 83-724 (appeal pending).

cOUNTERVAILING SECULAR INTERESTS OF EMPLOYERS AND CO-WORKERS VIOLATES THE CONSTITUTION BY IMPOSING AN ABSOLUTE PREFERENCE FOR RELIGIOUS VALUES.⁶

In defense of the constitutionality of such an absolute religious preference, Connecticut might argue that since the statute involves neither the expenditure of public funds nor the active involvement of public officials, it operates merely as a legitimate attempt to remove private barriers to the enjoyment of religious liberty, not unlike other statutes designed to eliminate private interference with the enjoyment of constitutional values. See, e.g., Griffin v. Breckenridge, 403 U.S. 88 (1971); United

⁶ The Sunday Closing Cases — McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys From Harrison v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); and Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961) — do not resolve the issue, since the Court treated Sunday closing laws, not as an aid to religion, but as a purely secular establishment of a uniform day of rest.

States v. Guest, 383 U.S. 745 (1966); United States v. Johnson, 390 U.S. 563 (1968). But see Scott v. Carpenters Local, 77 L.Ed 2d 1049 (1983). Given our national commitment to religious liberty, such a defense of the statute would not be without weight. On the other hand, the mere characterization of the Connecticut statute as one designed to remove private barriers to the free exercise of religion cannot end the analysis, since even the most blatant violations of the Establishment Clause may be characterized as designed to aid free exercise. Where, as here, a statute designed to remove private (as opposed to state-created) impediments to religious activity (1) is capable of imposing a substantial burden on, or even entirely overriding, legitimate secular interests of both employers and co-workers; (2) requires an uncomfortable degree of government involvement in its administration; (3) treats

orthodox Sabbatarian religious beliefs more favorably than both non-traditional religious values and non-religious interests of comparable significance; and (4) appears to place the imprimatur of the state upon traditional Sabbatarian religions, it goes beyond the concept of reasonable accommodation and is capable of applications which violate the Establishment Clause by forcing private persons to subsidize a third person's religious beliefs. If Connecticut could not, under traditional Establishment Clause principles, levy a tax on Caldor or its work force to support Thornton's religious practices, it is difficult to see why the State may compel a substantial payment in kind consisting of the forced labor of Thornton's co-workers.

Amici respectfully suggest, however, that it is neither necessary nor desirable to decide whether Connecticut may enforce an

absolute religious preference for Sabbath observance regardless of cost or consequences on the record in this case. Since the Supreme Court of Connecticut elected to review the statute's facial constitutionality, it did not attempt to determine whether, on the facts of this case, the less drastic and concededly constitutional standard of "reasonable accommodation" was satisfied. Unless some reason exists to depart from traditional review techniques, it is not necessary to pass upon hypothetical "absolute" applications of the Connecticut statute raising novel and difficult constitutional issues when the facts of this case might well permit resolution under the clearly acceptable constitutional standard of "reasonable accommodation".

II. THE CASE SHOULD BE REMANDED TO DETERMINE WHETHER CALDOR COULD HAVE ACCOMMODATED THORNTON'S REPUSAL TO WORK ON SUNDAY WITHOUT UNDUE

BURDEN TO ITSELF OR TO ITS WORK FORCE.

The Supreme Court of Connecticut construed § 53-303(e) as imposing an absolute rule assuring an employee the right to refrain from work on the employee's Sabbath regardless of the consequences to employers and to co-workers. As amici have suggested, such a construction of § 53-303(e), which is of course binding on this Court, goes substantially beyond the "reasonable accommodation" standard adopted in Title VII and raises serious constitutional issues. Having construed the Connecticut statute as imposing an absolute rule, the court below deemed it unnecessary to consider whether the employer's response to Thornton's refusal to work on Sunday was mandated by substantial secular concerns such as expense, business dislocation or unfairness to other employees. Instead, the court elected to

test the statute's facial constitutionality, holding that the promulgation of an absolute guaranty of employee time-off on the Sabbath violated the Establishment Clause, without considering whether, on the facts of this case, Connecticut could have granted relief to Thornton under a "reasonable accommodation" standard.

In effect, the court below elected to apply a facial overbreadth analysis which tests the constitutionality of a statute, not by applying it to the facts before the court, but by considering whether hypothetical applications would violate the Constitution. E.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Broadrick v. Oklahoma, 413 U.S. 601 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

Overbreadth review plays a critical role in maintaining a system of free expression.

By permitting courts to invalidate statutes deemed likely to exert a pall on vigorous enjoyment of constitutional rights, overbreadth review is often the preferred method of analyzing statutes in derogation of First Amendment values, especially where a statute's very existence is likely to deter vigorous speech. E.g., Gooding v. Wilson, 405 U.S. 518, 521 (1972); Los Angeles City Council v. Taxpayers for Vincent, ___ U.S._, 52 U.S.L.W. 4594, 4596-98 (May 15, 1984).

Overbreadth review is, however, an exception to the general rule which tests the constitutionality of statutes by applying them to the facts before the Court. United States v. Raines, 362 U.S. 17 (1960). Sedler, Standing to Assert Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962). In the absence of a danger that a statute's mere existence will deter the exercise of Constitutional rights, automatic use of the

doctrine leads, as here, to unnecessary constitutional adjudication in a factual vacuum.⁷

In New York v. Ferber, 458 U.S. 747 (1982), the New York Court of Appeals had invalidated a statute regulating the depiction of children in sexually explicit settings on facial overbreadth grounds. This Court reversed, ruling that the statute posed no constitutional difficulties as applied to the material before the Court and deferring for another day the constitutionality of the statute's hypothetical applicability to clearly protected activity.

A similar infirmity infects the approach

⁷ Even if one assumes — as do amici — that § 53-303(c) is capable of unconstitutional application, the price of a case-by-case approach is the prospect that several employers may be induced by the statute's apparently absolute language to defer to an employee's religious belief when they need not have done so. Such a "price" does not compare to the danger of self-censorship present in the ordinary First Amendment overbreadth case.

of the Connecticut Supreme Court in this case. By electing to review the facial validity of § 53-303(e), the court below ignored the factual context of this case and failed to consider whether, judged by a reasonable accommodation standard, Caldor was, nevertheless, liable. If, in fact, Caldor's dismissal of Thornton was not compelled by legitimate business needs, the facts of this case do not pose constitutional issues which differ from those raised in an ordinary Title VII case. See, e.g., Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir.) (1975), aff'd by an equally divided court, 429 U.S. 65 (1976). If, on the other hand, both Caldor and Thornton's co-workers would have been burdened with substantial inconvenience and expense by being forced by Connecticut to defer to Thornton's religious desires, application of the statute would violate the Establishment Clause.

Since the question of whether to invoke facial rather than as applied review in a federal constitutional context is itself a question of federal law appropriate for review by this Court, the decision of the Connecticut Supreme Court to apply facial review in the absence of a functional justification for its use should be vacated and the case remanded for "as applied" scrutiny. If, on remand, the Connecticut courts determine that Thornton's Sabbath observance could have been accommodated without imposing undue burdens on his employer or his co-workers, relief may be granted to Thornton's estate under § 53-303(e) without raising a serious constitutional issue. If, on the other hand, factual exploration reveals that accommodation was not possible without imposing undue burdens on non-believers, Connecticut courts will remain free to strike

down the application of § 53-303(e) in such a setting, subject of course to ultimate review by this Court.

CONCLUSION

For the above-described reasons, the decision of the Supreme Court of Connecticut should be vacated and the case remanded.

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New York, New York

AMICUS CURIAE

BRIEF

FILED

AUG 9 1984

ALEXANDER L. STEVENS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,
Petitioner.
and

STATE OF CONNECTICUT,
Intervenor,
v.

CALDOR, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

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Constitutional Authority

U.S. Const. amend. I	<i>passim</i>
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Statutes

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Section 701(j), 42 U.S.C. § 2000e(j)	<i>passim</i>
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON,
and *Petitioner,*

STATE OF CONNECTICUT,
v. *Intervenor,*

CALDOR, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

The Equal Employment Advisory Council (EEAC), with the written consent of the parties and the Intervenor, respectfully submits this brief as Amicus Curiae in support of the position of Respondent Caldor, Inc.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary, nonprofit association organized to represent the common interest of employers and the general public in developing and implementing sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.¹

¹ EEAC's membership comprises a broad segment of the employer community in the United States, including both individual employers and national trade and industry associations which them-

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., as well as other federal and state statutes, orders and regulations pertaining to non-discriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case, inasmuch as they call into question not only the constitutionality of a state statute regulating employment practices, but also the constitutionality of the religious accommodation provision of Title VII (Section 701(j), 42 U.S.C. 2000e(j)).

Insofar as the validity of the Title VII provision will be asserted as a basis for upholding the Connecticut statute here challenged and the same constitutional analysis applies to both the state and federal statutes, the questions presented here concerning the constitutionality of religious accommodation requirements are matters of importance to both EEAC's membership and the public generally. Because the resolution of this case will significantly affect employers, EEAC wishes to present its views that the Title VII cases relied upon to support Petitioner's position were wrongly decided and should not be used as a basis for affirming either the Connecticut or federal statute. Indeed, as the Solicitor General recognized in his *amicus* brief supporting the Petitioner, "A decision upholding the Connecticut law, which goes beyond the religious accommodation requirements of Title VII, would *a fortiori* resolve the constitutionality of the federal law." (Br. at 2).

Because of its interest in issues relating to equal employment, EEAC participated as *Amicus* before this

itself has hundreds of employer members with a common interest in the foregoing purposes. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Court in the case which provides the primary authority for the construction of the religious accommodation provision of Title VII (*Fresno World Airlines, Inc. v. Hardin*, 432 U.S. 63 (1977)), as well as in three of the appellate cases raising the constitutionality of this provision (*Goris v. Peoples Natural Gas Co.*, 613 F.2d 482 (3d Cir. 1980); *Nettelman v. A.O. Smith Corp.*, 643 F.2d 445 (7th Cir. 1981), cert. denied, 454 U.S. 1046 (1981); and *Anderson v. General Dynamics Corvair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982)).²

STATEMENT OF THE CASE

In 1975, Petitioner Donald Thornton became a supervisor with Respondent Caldor, Inc., a New England chain of retail stores. At that time, Connecticut required most employers to close on Sundays. In 1976, the Connecticut legislature authorized certain businesses to remain open on Sundays. The new law provided that no employee may be compelled to work more than six days in any calendar week, and further mandated that

No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.³

It is the constitutionality of this mandatory provision, as well as that of § 701(j) of Title VII, which are at issue in this case.

Pursuant to this state statute, in 1977 Caldor began doing business on Sundays. Thornton and other depart-

² Because of its concern with the legal and practical problems inherent in EEOC's approach to religious accommodation, EEAC filed extensive comments with EEOC regarding that agency's "Proposed Guidelines on Discrimination Because of Religion." See 29 C.F.R. § 1605 (1980).

³ Conn. Gen. Stat. § 53-300e(a)-(b) (1982). Section 53-300e goes on to specify the enforcement mechanism and penalty for violation of these criminal provisions.

ment managers were scheduled to work one out of every four Sundays. Although he worked thirty-one Sundays between 1977 and 1979, in November, 1979, Thornton informed Calder that, as a Presbyterian, he would no longer work on Sunday because that day was his Sabbath.

Following Thornton's ultimatum, Calder offered Thornton two choices: 1) transfer to a nearby Massachusetts store that was not open on Sundays, or 2) reassignment to a nonsupervisory position at his current location, whose union contract did not routinely involve Sunday workshifts. Thornton rejected both alternatives, resigned from his job and filed a grievance with the State Board of Mediation and Arbitration (the Board).

The Board, and subsequently the trial court, sustained the grievance. Calder argued that Thornton had not been "discharged" and that the statute was unconstitutional. The Board concluded that it could not decide the constitutional question. Calder moved the state court to vacate the Board's award. The trial court, relying on *McGowen v. Maryland*, 366 U.S. 420 (1961), concluded that I 53-303e(b) did not violate the establishment clause since, in its view, the primary effect of the Sabbath provision was secular, i.e., it limited the number of days per week which an employee may be compelled to work.

Calder appealed from this judgment, renewing its earlier challenges. The Connecticut Supreme Court reversed^{*} and held that I 53-303e(b) was unconstitutional on its face under the establishment clause of the First Amendment. In reaching this result, the Connecticut court applied the three-part test of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and found that I 53-303e failed all three parts of the Nyquist test.

First, the court concluded that I 53-303e(b) lacked a clearly secular purpose since "[t]he unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do

* The court sustained the Board's non-constitutional findings. 464 A.2d at 789-91.

so." 464 A.2d at 793. Noting that "[§ 53-303e(a)] adequately addresses the valid secular purpose . . . of forbidding uninterrupted labor," *Id.* at 792, the court rejected the notion that the term "Sabbath" was simply synonymous with a "day of rest" devoid of religious meaning. Thus, the additional immunity from work that I 53-303e(b) grants to an employee designating any day as his "Sabbath" "comes with religious strings attached" and this step "invalidates the subsection under the establishment clause." *Id.*

Second, the court found that the statute possessed the primary effect of advancing religion since "it confers its 'benefit' on an explicitly religious basis." *Id.* at 794 (emphasis supplied).⁸

Third, the court ruled that this law's "most troublesome" aspect was that it "creates excessive governmental entanglements between church and state" since enforcement of the statute will require "an analysis of the particular religious practices and . . . a decision concerning the scope of religious activities which may fairly be labelled 'observance of Sabbath.'" This state review is "exactly the type of 'comprehensive discriminating and continuing state surveillance'" which is prohibited by the Constitution. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

SUMMARY OF ARGUMENT

Under the First Amendment, neither a state nor the federal government may make a law respecting the "establishment of religion." To avoid violating this constitutional prohibition, a statute must pass all three parts of the test announced in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973). The statute

⁸ The court recognized that:

Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing. Workers who do not 'observe a Sabbath' may not avail themselves of the benefit provided by the subsection, and are not entitled to take a specific day off with impunity. *Id.*

in question must (1) have a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive governmental entanglement with religion. As the State Supreme Court correctly recognized, for the reasons summarized above, § 53-303e(b) of the Connecticut Sunday closing law satisfies none of these constitutional requirements.

Furthermore, the experience under Title VII of the Civil Rights Act of 1964 does not support the argument that § 53-303e(b) is constitutional under the First Amendment. Congress amended Title VII in 1972 to include an affirmative duty to accommodate on religious grounds. The legislative history clearly shows that its purpose was to aid the Sabbath observer and increase the membership of certain religious sects by providing a statutory right to accommodation. The appellate cases which have upheld the constitutionality of § 701(j) have overlooked the clearly sectarian thrust of this amendment, while those cases which have questioned its constitutionality have correctly perceived its true purpose. Thus, both the Connecticut statute and § 701(j) fail under the Nyquist test.

Finally, casting the issue in terms of promoting free exercise of religion cannot sidestep establishment clause inquiry under the Nyquist test. The free exercise clause, which is a bar to government action prohibiting religious freedom, cannot be used to justify a statute which improperly advances religion. In the instant case, it is the conduct of private entities which is being questioned, and this conduct is beyond the scope of the free exercise clause. There are no cases which provide authority for the view that a Sabbath observer has a right to compel another private party to defer to his religious needs. In view of the practical problems in defining religious practices and the constitutional problems inherent in government-sanctioned advancement of such practices, this Court should affirm the decision of the Connecticut Supreme Court finding that the "Sabbath" law is unconstitutional.

ARGUMENT

I. THE FIRST AMENDMENT IS A CONSTITUTIONAL BAR TO ANY GOVERNMENT-IMPOSED OBLIGATION ON EMPLOYERS TO ACCOMMODATE THE RELIGIOUS PRACTICES OF SOME EMPLOYEES TO THE DETRIMENT OF OTHERS IN THE WORK FORCE.

A. Applicable Constitutional Principles.

The authority of legislatures to regulate employment is limited by the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁴ Together, the Religion Clauses of the First Amendment were designed "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Thus, if a court finds that an employer has violated a religious accommodation statute, it is then "required to decide whether [that statutory provision] was constitutionally permissible under the Religion Clauses to the First Amendment." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979).

The establishment clause is, at its core, a statement about the proper role of government. To this end, it embodies the principles of separation and neutrality of government in its relationship with both religious institutions and religious beliefs and practices. As this Court held in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947):

The "establishment of religion" clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

⁴ U.S. Const. amend. I.

This Court has developed a settled method of analysis to determine whether a challenged government practice involves an impermissible step toward the establishment of religion. In *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973), it enunciated the approach for analyzing whether a statute violates the establishment clause:

(T)o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and third, must avoid excessive government entanglement with religion. [Citations omitted].⁷

Moreover, it is clear that while the free exercise clause prohibits state action to deny anyone the right of free exercise, "it has never meant that a majority could use the machinery of the state to practice its beliefs." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) (emphasis added). To so interpret free exercise is to deny meaning to the establishment clause. The establishment clause is violated when the power, prestige and financial support of government is placed behind a particular religious belief. *Id.* at 221. When this is done in the guise of promoting the free exercise of religion, the establishment clause is no less offended. Sophisticated attempts to avoid the Constitu-

⁷ Far from signaling a major change in mainstream establishment clause doctrine, this Court's recent case underscores the significance of the *Nyquist* test. In *Mosk v. Chambers*, 100 S.Ct. 2220 (1980), the Court focused on historical evidence in upholding a state legislature's practice of opening prayer. The conclusion that *Mosk* did not reshape establishment clause doctrine was confirmed when only this Term, in holding that a city's nativity scene display did not violate the establishment clause, the Court returned to the well-defined *Nyquist* analysis in *Lynch v. Donnelly*, 104 S.Ct. 2454 (1984). Thus, the *Lynch* decision makes it clear that the *Nyquist* test remains the fundamental tool of establishment clause analysis.

tion are just as invalid as simple-minded ones. *Loew v. Wilson*, 307 U.S. 268, 275 (1939).

For the foregoing reasons, the applicable constitutional standard is the three-part test of *Nyquist*. In order to be constitutional, the provision in question must meet all of these tests. Neither § 53-303e(b) nor § 701(j) of Title VII bears up under such scrutiny. As shown below, the purpose of each statute clearly is sectarian, their primary effect is to advance religion, and their application unavoidably entangles the courts and governmental agencies with religious issues.

B. The Connecticut Legislature's Purpose in Enacting Section 53-303e(b) Was Clearly Sectarian and Not Secular.

The scant legislative history of § 53-303e(b) reveals no evidence of a secular purpose for this statute. In 1976, the Connecticut legislature was forced to reconsider its Sunday closing laws after a state court declared them unconstitutional. Originally introduced as a bill to repeal all Sunday business regulation, the legislation ultimately enacted in fact substantially replaced the old law. Throughout the debate, legislators expressed the fear that employees would be forced to work on Sundays. While there are no direct references to § 53-303e(b) in this debate, the Senate's bill—containing § 53-303e—was finally adopted.⁸ The legislature's concern about Sunday work strongly suggest a sectarian motive.

⁸ See Note, A Critical History of Connecticut Sunday Closing Legislation Since 1960, 12 Conn. L. Rev. 599, 591 n.44 (1979). Substitution of the word "Sabbath" for "Sunday" in the final version, while serving to broaden slightly the number of Judaeo-Christian sects which may claim the benefit of this provision, does not alter the obviously sectarian thrust. The Connecticut state courts immediately voided the entire statutory scheme. *Id.* at 594. Despite the courts' condemnation, the legislature in 1978 responded by enacting yet another Sunday closing law—again containing § 53-303e—without addressing the constitutional infirmities of the previous statute. This revision has been found similarly invalid. See *Caldor's Inc. v. Bedding Barn, Inc.*, 177 Conn. 594, 417 A.2d 343 (1979).

Moreover, the statutory language specifically demonstrates a sectarian purpose. On its face, § 53-8(b)(b) is an undeniable message of endorsement of religion, as the court below properly determined. This conclusion is particularly compelled when the statute is considered alongside its companion subsection (a), which provides a weekly rest day to prevent uninterrupted labor. The additional blanket exemption from Sabbath work can only be viewed as furthering the nonsecular objective of improving the employment position of religious employees rather than improving the status of all employees, religious or nonreligious.

Postulating arguably secular purposes after the fact cannot save this provision from its basic infirmity that it was intended to benefit only those who alleged a religious belief. The three purportedly secular purposes which have been advanced are implausible since they are simply derivative from the advancement of religion. First, the goal of providing a common "day of rest" is undermined when that day can be individually selected. The Sunday-closing laws upheld by this Court in *McGowen* and its companion cases⁹ are thus distinguishable. Those laws, though undeniably religious in origin, were saved only on the theory that such laws today address the secular custom of resting one day a week and the religious element is a mere relic. The fact that this purpose "merely happens to coincide or harmonize with the tenets of some or all religions" was deemed incidental. *McGowen*, 366 U.S. at 442.¹⁰ Government abandons a secular purpose, however, when it singles out

⁹ *Brownfield v. Brown*, 366 U.S. 399 (1961); *Fox v. City of New Haven-Altona*, 366 U.S. 402 (1961); *Galloway v. O'Brien* (Lower Super Ct.), 366 U.S. 437 (1961).

¹⁰ However, as the *McGowen* majority emphatically stated, "We do not hold that Sunday legislation may not be a violation of the establishment clause if it can be demonstrated that its purpose—whether either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state's coercive power to aid religion." *Id.* at 433 (emphasis added).

certain religious creeds for special treatment as it has done here.¹¹ This departure from neutrality impermissibly confers the imprimatur of state approval on a particular religious practice and uses the state's coercive power to aid religion.

Second, Petitioner's assertion that providing employment opportunities for Sabbath observers "qualifies as a legitimate secular purpose" (Pet. Br. at 29) begs the question of the legitimacy of the state's goal. Casting the issue in terms of promoting the general cause of equal employment opportunity ignores the religious factor inherent in this benefit. Petitioner similarly ignores the fact that Sabbath observers are already protected from religious discrimination.¹² Ironically, rather than preventing discrimination, this statute promotes discrimination by requiring that employers favor certain employees and disfavor others on the basis of religion.

Nor is the Sabbath observer compelled to choose between working and his religion, as Petitioner asserts. (Pet. Br. at 29). He is not required to abandon his religious beliefs nor prevented from seeking a position that does not conflict with his restrictions on availability for work. But when the state, by legislative enactment, requires an employer to rearrange its business affairs, as well as impose upon its other employees, all to accommodate the Sabbath observer's desire to exercise his freely chosen religious practices, the government transgresses the establishment clause and seeks to favor him in support of his religion. This legislation, then, is not supported by legitimate secular purposes under the first prong of *Nyquist*.

¹¹ The lower court's careful analysis of the term "Sabbath," 464 A.2d at 793 n.8, far from representing mere technical nitpicking, illustrated the term's essential identification only with the Judeo-Christian sects. This provision thus undeniably favors those sects which observe a "Sabbath" and disfavors other strains of religious belief which do not.

¹² Conn. Gen. Stat. § 46a-51 (1979); 42 U.S.C. § 2000e-2(a)(1).

C. The Religious Accommodation Provision of Title VII Likewise is Based Upon a Sectarian Purpose and Therefore Cannot Be Used as Precedent to Support Connecticut's Statute.

Petitioner also wrongly relies upon Title VII federal precedent to argue that the Connecticut Sabbath statute is not unconstitutional (See Pet. Br. at 18; Conn. Br. at 16n-17n; U.S. Br. at 2). When Title VII's religious accommodation provision is examined in light of the Nyquist test, it also can be seen that its primary purpose is plainly sectarian.¹⁹ As demonstrated below, whether "religious accommodation" requirements are framed in absolute terms, as in Connecticut, or call for reasonable accommodation without undue hardship, as in Title VII, such statutes are nevertheless constitutionally invalid.

When it was enacted in 1964, Title VII simply required an employer to *refrain* from using religion as a criterion in employment decisions.²⁰ Religious accommodation as an affirmative duty first appeared in EEOC guidelines aimed at satisfying the "needs" of certain sabbatarians.²¹ Congress' subsequent inclusion in 1972 of religious accommodation in the statute was prompted by court cases construing these guidelines.²²

¹⁹ This Court has not resolved the question of whether Section 701(j) of Title VII is constitutional. See, *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd mem.* by evenly divided court, 429 U.S. 65 (1976); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd* by evenly divided court, 402 U.S. 689 (1971). The leading case construing Title VII's religious accommodation provision, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), did not reach the constitutional question.

²⁰ Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1).

²¹ EEOC "Guidelines on Discrimination Because of Religion," 29 C.F.R. § 1605.1 (1967).

²² In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (1970), the Sixth Circuit held that failing to accommodate a Sabbath observer's request not to work on Sundays did not violate Title VII, which was aimed only at inhibiting discriminatory practices. *Id.* at 331. The court questioned the authority to place upon an em-

In response to *Dewey* and *Riley*, as well as in response to the urging of certain religious sects, Senator Randolph introduced § 701(j) as an amendment to Title VII which essentially codified the affirmative duty to accommodate by providing:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Aside from references to the *Dewey* and *Riley* opinions, the legislative history of § 701(j) consists almost entirely of Senator Randolph's concern with the Sabbath observer.²³ The Senator was also concerned about employment policies that conflict with Sabbatarian practices and the impact of this conflict on membership in certain churches.²⁴

ployer a compulsory affirmative obligation to accommodate an employee's religious beliefs, noting that such a construction "would raise grave constitutional questions of violation of the Establishment Clause. . ." *Id.* at 334. In highlighting the inherently discriminatory nature of the accommodation requirement, the Sixth Circuit observed: "To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation." *Id.* at 330. See also *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971).

²³ The legislative debate appears in the Appendix to this brief. Court opinions and regulations inserted into the record by Senator Randolph are too lengthy to attach also to this brief. Senator Randolph stated:

. . . there are several religious bodies—we could call them religious sects; denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath, and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.

See p. 3a, remarks of Senator Randolph.

²⁴ See, Appendix, pp. 2a-4a.

From the legislative history, it is evident that the purpose of this amendment was to aid certain sects by creating a statutory "right" to have their Sabbath practices accommodated and to bolster the membership rolls of religions. As recognized by several judges and commentators, this obligation to grant employment preferences to religionists by adjusting neutral work policies when such policies conflict with religious practices has no clearly secular legislative purpose.²⁹

It is noteworthy that only the cases which have questioned the constitutionality of § 701(j) have discussed the major theme of Senator Randolph's remarks, i.e., the difficulties experienced by members of certain religious sects. In contrast, those cases which uphold this section cite, out of context, certain apparently neutral remarks which did not contradict or nullify the religious purposes expressed by the amendment's sponsor.³⁰ These attempts

²⁹ See Schles & Grossman, *Employment Discrimination Law*, 294 (1976) ("the remarks of Senator Randolph, who authored the 1972 Amendment to Section 701(j), refer to relieving pressures against religious practices which have led to a 'dwindling of the membership of some religious organizations' and certainly bring the legislative purpose into doubt."); *Tott v. North American Rockwell Corp.*, 428 F. Supp. 763, 766 (C.D. Cal. 1977) ("to ascribe . . . to the language of Senator Randolph . . . a secular purpose to put teeth into the comprehensive statutory scheme is pure sophistry"); and *Cummins v. Parker Seal Co.*, 516 F.2d 544, 558 (6th Cir. 1975) (dissent of Celebrezze, J.) ("The purpose evident in [Senator Randolph's] remarks is the promotion of certain religions whose followers' practices conflict with employers' schedules.").

³⁰ See, e.g., *Cooper v. General Dynamics, Convair Aerospace Div.*, 523 F.2d 163, 168 n. 9 (5th Cir. 1976), cert. denied, 428 U.S. 908 (1977); *Riley v. Bendix Corp.*, 464 F.2d 1118, 1116-17 (5th Cir. 1972); *Cummins v. Parker Seal*, 516 F.2d 544, 552; *Coats v. McDonnell* v. *Essex Int'l, Inc.*, 604 F.2d 34, 34 (6th Cir. 1982); *Tuday v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nettelbeck v. A. O. Smith Corp.*, 643 F.2d 445, 453-55 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). For this reason, the cases which hold, either directly or impliedly, that § 701(j) is unconstitutional are not convincing.

to import into § 701(j) the earlier overall objective of Title VII itself by suggesting that the Senator's "overriding theme" was the elimination of religious discrimination in employment are unconvincing. This amendment must be judged by its own legislative history which, read in its entirety, and especially in light of the words of the proponent, shows that it was adopted to advance an obviously religious end.

The reasons for this conclusion were ably summarized in Judge Celebrezze's dissent in *Cummins*, which like *Deweey* and *Riley*, involved a claim by a Sabbath observer that his religious practices conflicted with otherwise neutral work policies:

[Section 701(j)] defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than "putting teeth" into the Act, it mandates religious discrimination, thus departing from the Act's basic purpose. [Citation omitted]

The second purportedly secular justification for the rule is that it recognizes that "certain persons will not compromise their religious convictions" and ensures "that they will not be punished for the supremacy of conscience."

The absence of a religious accommodation rule, however, would not amount to punishment. It would simply as a "hands-off" attitude on government's part, allowing employers and employees to settle their own differences. The rule grants benefits to religious practitioners because of their religion. The second rationale the majority advances, therefore, amounts to an assertion that it is a valid secular purpose to grant preferences to persons whose religious practices do not fit prevailing patterns. 561 F. 2d 544, 556.

In view of the above, it is apparent that § 701(j), like the Connecticut statute, lacks a clearly secular purpose, and falls under the first prong of the Nyquist test.

D. The Primary Effect of Religious Accommodation Statutes Is the Advancement of Religion.

The inevitable effect of enforcing either the state or federal provision is the same—advancement of religion—and these statutes can be evaluated together under the second prong of the *Nyquist* test. The primary effect of both statutes is the direct advancement of the interests of religionists generally over the interests of non-religionists and the advancement of the interests of only certain sects over other sects not favored by such accommodations. That government has thus singled out a narrow class of citizens based on religion as beneficiaries of compulsory special treatment bolsters the argument that these statutes are inconsistent with the establishment clause.

These statutes aid religion generally over non-religion by requiring employers to award a widely-coveted employment benefit—weekend time off—to those who desire it for religious reasons, to the detriment of others who prefer not to work weekends on secular grounds. Requests for accommodation by non-religious employees, or by religionists whose faith is not the basis of their request, need not be granted in any way, no matter how important the accommodation may be to such persons.¹¹ Significantly, non-religious employees may have equally strong reasons for preferring not to work on weekends, but cannot invoke the benefits which these statutes afford co-workers who use their religious beliefs to claim time off. In this light, it is clear that the primary effect of both statutes is that they foster discrimination by elevating religious freedom over other protected First Amendment rights.

¹¹ For example, in *Brown v. General Motors Corp.*, 601 F.2d 306 (8th Cir. 1979), the court implicitly recognized the preferential treatment accorded by § 701(j) when it observed that § 701(j) "does not require an employer to reasonably accommodate the purely personal preferences of its employees. Accordingly, the costs [of accommodating a religionist] do not include covering vast numbers of employees who wish to have Friday night off for secular reasons." *Id.* at 308.

These statutes also favor the interests of particular sects over the interests of other religious groups in violation of government's mandate of neutrality in the face of competition between various religious sects.¹² These statutes do not purport to be neutral; they directly endorse the Sabbath practices of certain sects. For example, many members of those denominations which observe a Sunday Sabbath work on Sundays because their jobs require it, even though such employees might strongly prefer to be free on Sundays. Even if there are no strong mandates from church hierarchy forbidding Sunday work, members of such churches could, like Thornton, easily find scriptural or other religious authority to vindicate an assertion that it is a religious duty to refrain from Sunday work. However, since the burden of proving a "bona fide and sincere religious belief" will be lighter for a member of a sect having a strong official position regarding Sabbath observance, these statutes favor members of sects which take such a position.¹³

Moreover, an employer faced with conflicting demands of several religious employees may be forced by business needs to choose which one receives the time off, thus expressing a preference between religions. The effect of such demands is to advance the interests of certain religious sects at the expense of other employees, including those who follow no religion at all. This special treatment is

¹² *Zorach v. Clausen*, 343 U.S. 306, 314 (1952).

¹³ See *Thornton v. Watkins*, 267 U.S. 428, 435 (1924). Petitioner's position in this regard is self-contradictory. He asserts both that § 13-301e(b) does not grant preferential treatment (*Id.* at 24) and that it is constitutionally permissible for government, via § 13-301e(b), to require employers to alter their conduct to accommodate the religious needs of some employees because of the "special burden" that normal work schedules represent. *Id.* By requiring an accommodation to Sabbath observers which others may not enjoy, these laws set out a special class based upon religion. Accepting the fact that religious discrimination is impermissible, the question still remains whether the preferences required by these statutes are constitutional.

the antithesis of the neutrality required by the establishment clause.

This Court has often recognized that the narrowness of the benefited class is a key factor in finding a primary effect inconsistent with the establishment clause.¹⁹ In *Gillette v. United States*, 401 U.S. 437, 452 (1971), the Court cited with approval Justice Harlan's analysis of statutory "underinclusion" in *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970):

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included].

Applying this standard to both § 53-300e(b) and § 701(j) reveals that both statutes are fatally underinclusive, since they exclude from the statutes' protection a number of groups that could be thought to fall within its natural perimeter.²⁰ The class of persons who are affected by

¹⁹ *Muller v. Allen*, 363 U.S. 3062, 3068 (1968); *Silva v. Lemon*, 413 U.S. 825, 831 (1973). Further, petitioner's argument that § 53-300e(b) does not provide an economic benefit is plainly wrong. (Pet. Br. at 23). Primary effect analysis is not limited to financial aid alone. See *Engel v. Vitale*, 370 U.S. 421 (1962). Nevertheless, it is clearly an economic benefit to remain employed while receiving time off not enjoyed by other employees and, at the same time, be immune from discharge, all under color of religious practice.

²⁰ Equal treatment of all persons regardless of religious belief or lack thereof is a primary establishment clause concern. In his dissent in *Gillette v. United States*, 401 U.S. 437, 458-460 (1971), Justice Douglas quoted with approval Justice Black's dissent in *Boruck*, 343 U.S. at 329: "The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law."

In this regard, the United States admitted what is the fundamental problem under these statutes when it said, "a governmental

employment practice includes all employees with strongly held bona fide reasons for wishing to be excused from compliance with that practice. The precise nature of the reason asserted should be immaterial—if the individual is not accommodated, he falls within the class of those adversely treated. Yet, under § 53-300e(b) and § 701(j), only those with religious reasons are benefited.

In large measure, the confusion on the part of the proponents of "religious accommodation" flows from their failure to perceive that in virtually all of the situations in which these statutes impose a duty to accommodate, there has been no discrimination on the basis of religion.²¹ Rather, the question is whether otherwise legitimate employment practices, such as a normal workweek which affects all relevant employees, must be changed in response to religious beliefs which all employees do not hold. Thus, if an employer refuses to grant any requests for accommodation, the religionist has been treated equally with all others in that class. In this light, it is incorrect to suggest that such refusals to accommodate are discriminatory.

Although the Supreme Court in *Hurdles* did not reach the establishment clause issue when construing § 701(j), its decision reflected the equal protection analysis implicit in determining whether a statute offends the neutrality required by the establishment clause. The Court said:

accommodation to religion might well be invalid if it discriminates among religions or if it amounted to an endorsement of a particular religion." (U.S. Br. at 19), while concluding that these statutes "[do] not, of course, benefit all persons equally." *Id.*

²¹ See Pet. Br. at 24 ("when Sabbath work is demanded by facially neutral employment requirements," the employee "suffers discrimination on religious grounds.") (emphasis added); Com. Br. at 24 (the purpose of § 53-300e(b) is "to achieve equality of employment opportunities by eliminating discriminatory employment practices."); U.S. Br. at 19; and remarks of Senator Randolph, Appendix B-6.

Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.⁷⁷

This analysis applies with equal force to the present case, as the court below properly acknowledged. 464 A.2d at 794. Nonreligious employees, or religious employees whose sects do not observe a Sabbath, who may want to be equally accommodated with regard to the same employment practices, are denied equal protection under the law. Instead of prohibiting religious discrimination, these statutes improperly advance religious interests and exhibit none of the features which might save them from demise: they do not purport to be neutral, and the benefit derived is neither incidental nor indirect. They are not generally applicable to a broad class of persons, only some of whom are religious. For these reasons, both statutes are invalid under the second prong of the Nyquist test.

⁷⁷ 432 U.S. at 84-85. See also *id.* at 81 ("Title VII does not require an employer to deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others"); and *id.* at 83 ("TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison meet his religious obligations").

E. Both Statutes Improperly Entangle Government in Religion.

The court below correctly perceived that § 53-300e(b) also offends the final element of the Nyquist test which prohibits potential entanglement between government and religious authority. Section 701(j) is similarly flawed. The entanglement principle is not confined to institutional involvement; it limits the scope of judicial inquiry into a claimed religious belief.⁷⁸ If the Constitution prohibits government inquiry into questions of religious dogma and belief, the "clearest and surest way to this end is for government not to inquire into the truth of religious claims or the degree of sincerity with which they are maintained." M. Korvitz, *Religious Liberty and Conscience: A Constitutional Inquiry*, 68 (Viking 1968).

Recent cases strongly support the view that there are strict constitutional limitations upon the government's authority to determine the rights and responsibilities of private parties where religion is involved.⁷⁹ The en-

⁷⁷ See *Espel v. Vitale*, 379 U.S. 421 (1962); *United States v. Ballard*, 322 U.S. 78 (1944).

⁷⁸ For example, in *New York v. Cathedral Academy*, 434 U.S. 195, 198-99 (1977), in striking down a reimbursement scheme, the Court declared:

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantees against religious establishment, and it cannot be dismissed by saying it will happen only once. Similarly, in *Catholic Bishop* the Court affirmed the restraint on NLRA jurisdiction over lay teachers employed by a parochial school, noting that:

... resolution of charges [that challenged practices are mandated by religious creeds] ... will necessarily involve inquiry into the good faith of the position asserted ... [I]t is not only the conclusions which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

⁷⁹ 440 U.S. at 502. The Court concluded that such entanglement would create at least a "significant risk" that the First Amendment would be infringed.

tanglement problem is not limited to government interference with religious institutions, but arises wherever an individual claims that his conduct or belief is "religious" under a statute that grants a privilege based on religious belief.

It is here where the statutes under review unavoidably involve government entanglement. The religious nature of the conduct or belief is the operative factor triggering the benefit of these statutes. By mandating such a privilege, the government necessarily assumes the power to determine what constitutes a religion. Whether this is done overtly by definition, as in § 701(j), or implicitly through enforcement, as in § 55-5(b)(b), is unimportant. In either case, government expresses official approval or disapproval of certain religious practices through its power to grant or withhold the privileged status. When government assumes this power, it engages in the most fundamental form of entanglement.²⁰

Moreover, where, as here, the availability of a benefit hinges on the existence of a religious ground, inquiry into the bona fides of such a claim cannot be avoided. Instead, it must first be determined whether the asserted belief is "religious" within the meaning of the relevant statutes and second, whether it is sincerely held. To avoid the obvious constitutional problems raised by inquiry into belief, Petitioner urges that the only issue which need be considered is "sincerity". (Pet. Br. at 36). This would eliminate the threshold issue of whether an asserted belief is entitled to statutory protection and leads to the untenable position that any allegedly "religious" claim would be recognized if the claimant is "sincere". But as this Court has noted, "'sincerity' is a concept that can bear only so much adjudicative weight." Gillette, 401 U.S. at 437.²¹

²⁰ See district court decisions in *Garcia*, 614 F. Supp. 622, 632 (W.D. Pa. 1979), and *Anderson*, 689 F. Supp. 782, 791 (S.D. Cal. 1988).

²¹ The draft exemption case cited by Petitioner and cited in no way relieves the courts of their responsibility to determine what

With regard to both § 55-5(b)(b) and § 701(j), the entanglement issue is thrust into the foreground by the statutes themselves. Under Title VII, to establish a *prima facie* case of religious discrimination, a plaintiff must as a threshold matter plead and prove that he had a sincere bona fide religious belief which conflicted with a particular employment practice, such as work schedule.²² If there is no bona fide religious belief, the duty to accommodate never arises, since employers need not oblige purely personal preferences. Similarly, under § 55-5(b)(b), if there is no bona fide claim of observing a "Sabbath," the employer is not required to excuse the employee from work. Accordingly, employers may not be foreclosed from requiring some proof beyond a mere declaration of sincerity that a particular day is an employee's "Sabbath". The employer, therefore, under government compulsion, is faced with deciding whether an asserted belief is religious. As the intensity of litigation

constitutes Sabbath observance under either § 55-5(b)(b) or § 701(j) of Title VII. In these cases, the Supreme Court was not providing a constitutional definition of "religious belief" that would be controlling in construing other statutes. As the Court stated in *United States v. Seeger*, 380 U.S. 368, 374 (1965), in construing the meaning of "religious," the Court was doing so "only in relation to the language of § 6(j) [of the Selective Service Act] and not otherwise." (Emphasis added). Further, in *Walik v. United States*, 394 U.S. 888 (1970), the Court construed that statute so as to eliminate the religious content necessary for conscientious objector status. In these cases, the sincerity inquiry was necessary only because a government-devised need for sacrifice potentially infringed on free exercise rights. Thus, the argument that the amendment required to enforce religious accommodation statutes is no more than that required under the draft exemption case is based on a questionable analogy.

²² See *Anderson*, 689 F.2d at 1248; *Baldwin v. GAP Corp.*, 874 F.2d 897, 902 (7th Cir. 1989). To this regard, the court of appeals in *Garcia v. Peoples Natural Gas Co.*, 613 F.2d 680 (3d Cir. 1980), was clearly in error when it held that "the constitutional issue presupposes lack of accommodation." Id. at 684-85. Contrary to the court's reasoning, until there is a determination of the validity and sincerity of the belief in question, no duty to accommodate can be said to exist.

In this area indicates, the employer's decision will be subject to judicial scrutiny.²⁴ Further, to the extent that the interests of the employer and the religionist are balanced in determining the "reasonableness" of a requested accommodation, that decision is premised on a judgment as to whether the asserted belief is itself reasonable. That this leads, as it necessarily does, to constitutionally forbidden inquiry is precisely the problem: these statutes foster impermissible entanglement with religion.

As demonstrated above, neither § 133-30(e)(b) nor § 701(j) withstand scrutiny under any of the three prongs of the *Nyquist* test. Their purpose and primary effect is to benefit particular religions or religion generally, and their enforcement inevitably results in impermissible government entanglement with religion. Consistent with the mandate of the establishment clause, both § 133-30(e)(b) and § 701(j) are unconstitutional.

III. THE CONSTITUTIONAL PROVISION AGAINST GOVERNMENT ACTION THAT WOULD PROHIBIT THE FREE EXERCISE OF RELIGION CANNOT BE TRANSFORMED INTO AN ALTERNATIVE FOR STATUTORY POLICY AFFIRMATIVELY REQUIRING PRIVATE EMPLOYERS TO ADVANCE RELIGIOUS ENDS.

Although it is not necessary to use the free exercise clause to invalidate religious accommodation statutes, a review of free exercise considerations highlights their

²⁴ Thus, courts are forced into the business of determining whether a belief is, in fact, a sincere religious one. In this regard, the confusion of the courts on their proper role is already apparent. For example, *Sherbert v. GAF*, 676 F.2d at 988, and *Cooper v. General Dynamics*, 689 F.2d at 1288, found that "all forms and aspects of religion, however unusual" are protected. Other courts have selected somewhat "religious" beliefs simply because they are not "generally accepted." See, e.g., *Perez v. Perez*, 613 F. Supp. 2082 (S.D. Fla. 1987), *aff'd*, 889 F.2d 1113 (10th Cir. 1989). The First Amendment implications of such expansions are manifold, for they poison the clear possibility of the courts denying statutory protection to beliefs that are genuinely but not widely held.

interplay with the establishment clause. It has been suggested that § 133-30(e)(b) passes constitutional scrutiny because its purpose was to promote the "free exercise" of religion and alleviate the "special burdens" that Sabbath observers face where their beliefs conflict with their employer's work schedules.²⁵ While this argument may have some emotional appeal, it does not change the Constitution. The free exercise clause is not a grant of authority permitting the government to act affirmatively to advance religious ends. Faced with substantially the same argument, the Court in *Nyquist* recognized that, because tension inevitably exists between the free exercise and the establishment clauses, government must remain neutral. The Court declared that neither sympathy for these burdens nor highminded social purposes "may justify an eroding of the limitation of the Establishment Clause now firmly emplanted." 413 U.S. at 788-89. Here, as in *Nyquist*, both the state and federal governments have taken a step which can only be regarded as advancing religion. As shown below, however, due to the absence of state action, religious accommodation rules are not compelled by the free exercise clause.

The establishment clause and the free exercise clause are two very different prohibitions, and protecting free exercise was not the only aim of the establishment clause. *McGowen*, 366 U.S. at 430. The free exercise clause prohibits government action interfering with the religious affairs of private citizens. Accordingly, private employer conduct generally would not be expected to raise free exercise clause issues, and purely private action cannot contravene the First Amendment.

For this reason, contrary to Petitioner's and Intervenor's assumptions, *Sherbert v. Verner*, 374 U.S. 398 (1963), is not the governing principle in this case.²⁶

²⁵ See, e.g., Pet. Br. at 13-17, 29; Conn. Br. at 12, 18, 27; U.S. Br. at 15-16, 26, 28.

²⁶ Pet. Br. at 13-14; Conn. Br. at 19. *Sherbert* held that a Sabbath observer whose religious beliefs precluded Saturday work

The essential teaching of *Sherbert*, *Thomas* and *Yoder* is that an otherwise constitutional law may not be applied against persons for whom the law creates a burden on religious belief or practice.²² These cases did not say that government can step in and force private citizens to support certain religious practices. Accordingly, the limits of permissible government accommodation to religion involve exemption from government-imposed requirements or programs.²³

Neither can the free exercise clause be used to support an attempt to coerce or compel others to accommodate their ways to the patterns of an individual's religious practice. Indeed, the Constitution serves to ensure that

was eligible for unemployment benefits. The holding in *Sherbert* "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of [government with religion] which it is the object of the establishment clause to forestall." 374 U.S. at 409. It means that government may not grant public benefits to a uniform class of persons, but exclude certain people "because of their faith or lack of it . . ." *Id.* at 410 (quoting *Everson*, 330 U.S. at 16). Accord *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (unemployment benefits for religionist opposed to weapons manufacture).

Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Amish school children were granted an exemption from state compulsory education laws because of the burden they placed on appellants' free exercise of their religion. Nevertheless, the Court warned of the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the establishment clause. *Id.* at 221.

²² See, *Marsk*, 108 S.Ct. at 2341 n.13 (Brennan, J., dissenting); *Nottelson*, 643 F.2d at 454-55.

²³ See, e.g., *Wais*, 397 U.S. at 673. On this point, *Lynch* is inapt since the Court's reference to a constitutional mandate of accommodation, 104 S. Ct. at 1309, applied to government in its public actions, such as released time from public schools, and use of public facilities for religious instruction. *Lynch* itself only involved government, not private, action. In this light, the holdings in *Zorack* and *Tilton v. Richardson*, 403 U.S. 672 (1971), likewise do not control.

no one need bow to the religious beliefs of another.²⁴ On this point, the statement in *Castwell v. Connecticut*, 310 U.S. 296, 303-304 (1940), has often been quoted: "[The First Amendment] embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." Or, as Judge Learned Hand put it:

The First Amendment protects one against action by the government, though even then, not in all circumstances . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life.²⁵

Cummins, 516 F.2d at 550 (quoting *Otten v. Baltimore & O. R.R.*, 205 F.2d 58, 61 (2d Cir. 1953)). Thus, when a Sabbath observer seeks to force his employer to modify its business schedule to accommodate his particular religious practices, the limits of the freedom to act on, or freely exercise, his religious beliefs are exceeded.

Furthermore, when government participates in this effort by enforcing any such "accommodation," whether it does so in absolute terms, as Connecticut has done, or whether it makes judgments about "reasonableness" and "undue hardship," as Title VII purports to do, it not only violates its fundamental obligation of neutrality, it directly contravenes the establishment clause. No declaration of supporting "free exercise" can overcome the constitutional ban. Neither the draft exemption cases²⁶

²⁴ As Justice Brennan observed in *Sherbert*, the recognition of the claimants' right to unemployment benefits was possible because it did not "serve to abridge any other person's religious liberties." 374 U.S. at 409.

²⁵ The draft exemption cases do not resolve the question of whether government has the constitutional authority to impose upon private employers a duty to give preferences to certain religious beliefs. Instead, they approve the authority of Congress to exempt conscientious objectors from military service obligations which had

nor the union does cases⁴⁰ provide authority for the view that a Sabbath observer has an enforceable constitutional right to impose his religious beliefs on his employer and interfere with the operation of its business.

Courts have by no means held that even a purported affirmative duty to accommodate an employee's "free exercise" rights is absolute in all circumstances.⁴¹ This fact is most apparent in those cases involving religious accommodation demands which would contravene seniority provisions in union contracts. For example, in *Hardison* the Court interpreted the arguably less stringent requirement of Title VII as subordinate to the provisions of the union contract and the seniority rights of other employees.⁴² *Hardison* stands at least for the proposition that

⁴⁰ Significantly, the union dues cases are the only religious accommodation cases which arguably involved "government action" since in those cases a union sought to enforce statutorily authorized union security provisions under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), against individuals who demanded exemption from dues payment obligations for religious reasons. As such, these cases do not support the argument that there is a private duty to accommodate in situations where the employment practice allegedly interfering with free exercise rights has not been imposed by government. See, e.g., *McDaniel*, 694 F.2d at 87; *Nuttall*, 643 F.2d at 455; *Tuday*, 648 F.2d at 1245; *Yoff*, 602 F.2d at 909; *Burns v. Southern Pac. Transp. Co.*, 600 F.2d 403, 406 (9th Cir. 1979), cert. denied, 449 U.S. 1072 (1979).

⁴¹ See, e.g., *Jordan v. N.C. Nat'l Bank*, 545 F.2d 72 (4th Cir. 1977); *Wren v. T.J.M.E.-D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979); *Plaucker v. Joint District No. 84*, 34 FEP Cases 1870 (10th Cir. 1984).

⁴² 432 U.S. at 88. *Accord Huston v. Local No. 91, UAW*, 509 F.2d 477 (8th Cir. 1977). Indeed, the principle that, absent intentional

regulating private conduct to the extent of mandating preferential treatment on the basis of religion could raise serious constitutional questions. Because Connecticut's statute is broader than § 701(j) in that it permits no exceptions to the duty to accommodate, the constitutional questions unnecessary to the federal statutory interpretation under *Hardison* cannot be avoided. In light of the foregoing constitutional objections, Connecticut's absolute statute must inevitably fall.⁴³

To the extent that religious accommodation statutes do not entail any government action which has inhibited the free exercise of religion, they cannot be justified on the basis of the free exercise clause. By enforcing such pro-

tectionism in their application, minority systems under Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), take precedence over other aspects of antidiscrimination statutes has been repeatedly upheld by the Court. See, e.g., *W.R. Grace & Co. v. Local Union 718, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 103 S.Ct. 2177 (1983); *Memphis Fire Dept. v. Stotts*, 82 U.S.L.W. 4767 (1984).

⁴³ For this reason, the argument that the Connecticut courts have not had an opportunity to construe the statute to determine whether this requirement is less than absolute (Pet. Br. at 35; Conn. Br. at 17n; U.S. Br. at 9) is unavailing. Petitioner and Intervenor appear to seek safety in numbers by enumerating the states and territories which purportedly have "similar laws protecting religious observers." (Pet. Br. at 18; Conn. Br. at 21n-24n). Of the provisions listed which relate to private employment, however, thirty-one provide simply for nondiscrimination because of religion, while only nineteen have some sort of reasonable accommodation requirement. None has the absolute mandate contained in the Connecticut statute, making Intervenor's statement that New York's statute is "nearly identical" (Conn. Br. at 21n-24n) and its declaration that there is "little if any difference" between § 88-8(b)(b) and § 701(j) (Conn. Br. at 18n-17n) astonishing. Mandating accommodation of religious practices such as Sabbath observance goes far beyond merely protecting the free exercise of religious beliefs. There is a clear difference between an absolute mandate and one which provides for exceptions. Nevertheless, any government involvement favoring religion violates the establishment clause; whether it does so in all cases or just in those where no "hardship" is demonstrated is irrelevant.

visions, government abandons the pretense of benevolent neutrality required by the establishment clause."²⁰

EEAC joins respondent in urging this Court to hold that, as long as there is no intent to discriminate, there is no affirmative duty for employers to accommodate the religious practices of Sabbath observers. As demonstrated above, religious accommodation provisions, such as Connecticut's § 53-303e(b) and Title VII's § 701(j), violate the First Amendment, and cannot be lawfully advanced by either state or federal government, even under the otherwise welcome standard of equal employment opportunity.

CONCLUSION

For the reasons stated, religious accommodation statutes are unconstitutional. Therefore, the holding of the court below should be affirmed.

Respectfully submitted,

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²⁰ To a large degree, Petitioner's and amici's emphasis on the proposition that benevolence permits accommodation results from the confusion which arises when one equates neutrality with hostility. See, e.g., Pet. Br. at 12, 19; Com. Br. at 13-19; U.S. Br. at 13-24. Failure to enact religious accommodation rules would not be hostility or callous indifference toward religion, but simply a neutral attitude on government's part. As Justice Brennan stated in his concurring opinion in *Arkansas*, "Invariably, insistence upon neutrality . . . may appear to border upon religious hostility. But in the long view the independence of both church and state . . . will be better served by close adherence to the neutrality principle." 874 U.S. at 248. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968). An objective to compliance is not hostility toward religion, as Petitioner would have this Court believe.

APPENDIX

APPENDIX

[Excerpt from the Legislative History of Section 701(j) of Title VII of the Civil Rights Act of 1964. Legislative History of The Equal Employment Opportunity Act of 1972, Volume 2, 711-715 (1972); also reported at Congressional Record, Volume 118, Part 1, 706-706 (92d Congress, 2d Sess., Jan. 21, 1972).¹]

* * * *

The Senate continued with the consideration of the bill (S. 2515) a bill to further promote equal employment opportunities for American workers.

MR. RANDOLPH. Mr. President, I send an amendment to the desk and ask that it be stated.

The ACTING PRESIDENT pro tempore. The Chair is advised that there is an amendment pending. Is the amendment of the Senator from West Virginia an amendment to that amendment or is the Senator asking that the pending amendment be set aside?

MR. DOMINICK. Mr. President, I ask unanimous consent that the pending amendment, the Dominick amendment, be set aside temporarily so that the Senator from West Virginia (Mr. Randolph) may present his amendment, and that the Dominick amendment be taken up immediately after completion of the amendment of the Senator from West Virginia.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

¹ This Appendix includes the legislative debate with respect to the enactment of Section 701(j). Senator Randolph also inserted into the record the court decisions in *Dowdy v. Reynolds Metals Co.* and *Billy v. Bendix Corp.*, as well as EEOC guidelines and regulations. See Legislative History, Vol. 2, *supra*, 715-716; Congressional Record, Vol. 118, Pt. 1, *supra*, 706-706. These latter documents are not included herein because of their length.

The amendment of the Senator from West Virginia will be stated.

The legislative clerk read as follows:

On page 33, after line 13, insert the following:

"(6) After subsection (i) insert the following new subsection (j):

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Mr. RANDOLPH. Mr. President, it is my hope that we can have a roll-call vote on this amendment, not that there is opposition to the amendment itself, but it is felt that a rollcall would serve a constructive purpose.

I am grateful to my able colleague from Colorado for permitting me to use just a few minutes in presenting the reasons why I have proposed this amendment to the pending legislation.

Mr. President, I ask unanimous consent to include as co-sponsors of the amendment the Senator from New York (Mr. Javits), the Senator from Maryland (Mr. Beall), and the Senator from California (Mr. Cranston).

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. RANDOLPH. Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some way. So in present-

ing this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.

I am sure that my colleagues are well aware that there are several religious bodies—we would call them religious sects; denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday, or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 420,000 men and women in the work force who are Seventh-day Adventists.

Mr. President, I am a member of a denomination which is a relatively small one, the Seventh Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, "From eve unto eve shall you celebrate your Sabbath." I make this statement only by way of explanation of the groups I have just mentioned.

I think it is important for us to realize that the persons for whom I hope I speak—and I hope I speak for all persons in this matter—are workers scattered throughout the United States of America. There is no section of the country which would not be affected, we hope constructively, by the adoption of this amendment.

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

I hold my membership in our church here in this area. We have the Washington Seventh Day Baptist Church. We have several of those churches in my State of West Virginia. At an earlier period I held my membership in the Salem, W. Va., Seventh Day Baptist Church.

I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Newark, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

I think in the Civil Rights Act we then intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on the question.

The amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

Mr. President, the competent chairman of the Labor and Public Welfare Committee, who is the chief sponsor of S. 2515, and who is their managing the very bill before us, I believe understands and appreciates, and I hope agrees with, the arguments that I am presenting. I have had some opportunity to consult with him in reference to the amendment. I hope he can agree that there can be at least an agreement on the amendment, even though we have a roll call upon it, hopefully in the next few minutes. I think it is a well-intentioned amendment, a necessary amendment, a worthwhile amendment because it carries through the spirit of religious freedom under the Constitution of the United States.

Mr. President, I, therefore, urge most earnestly the adoption of the amendment.

Mr. DOMINICK. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield to my colleague from Colorado.

Mr. DOMINICK. I have listened very carefully to the Senator's presentation, and was impressed by it. Could the Senator tell me, whether this amendment would also affect, for example, the Amish, or some other religious sect which has a different method of conducting their lives than do most Americans?

Mr. RANDOLPH. Yes, I envisage that it would.

Mr. DOMINICK. Would it apply to the following situation? A young man I just talked to from Virginia, works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6-day week?

Mr. RANDOLPH. I do not believe that an undue hardship would come to such an employer. The Senator has explained a specific case. I do not believe that there are really problems that would flow from the adoption of this amendment in connection with the employer meeting situations that he could not properly handle with employees.

Mr. DOMINICK. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country. It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observ-

ance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment on it?

Mr. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

Mr. DOMINICK. I thank the Senator from West Virginia.

Mr. WILLIAMS. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield.

Mr. WILLIAMS. I did not follow the last colloquy entirely, and perhaps this is the same question, but where the employment is such that the job has to be done on a day that a person under his faith would make his religious observations, it might be an undue hardship to close down the operation to accommodate that person. There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who would not work on one of the 2 days of the employment; this would be an undue hardship, and the employer's situation is protected under the amendment offered by the Senator from West Virginia, is it not?

Mr. RANDOLPH. That is correct; yes. I am in agreement with the Senator's statement.

Mr. WILLIAMS. It seems to me that this codifies a very worthy general practice, but there are situations—

Mr. RANDOLPH. There are the gray areas, and I recognize them. But I think the thrust of what we would have here is important at this time.

Mr. WILLIAMS. Yes.

Mr. RANDOLPH. The purpose to be achieved.

Mr. WILLIAMS. The Senator and I are employers. As a matter of practice, we recognize the days of religious observations of some of our staffs, even though they are regular working days, generally, of the Senate, its committees, and its officers.

Mr. RANDOLPH. That is correct. I know of many instances of that kind. I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment; and if in perhaps a very, very small percentage of cases that is not able to be accomplished, that should not deter the Senate in its action in approving this amendment.

Mr. WILLIAMS. As I read the first amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard.

I certainly agree with the objective of the amendment.

Mr. RANDOLPH. I appreciate what the able chairman is saying. I refer to the presence in the Chamber of our

colleague from Ohio (Mr. Saxbe). There are, in the Seventh Day Baptist Church, of which I am a member, many individual members of our faith who belong to our churches within the State of Ohio. We have, usually, small churches in small communities in the State the Senator so ably represents.

I add also the Senator from Colorado. I think it is not inappropriate for me to say that one of our strong churches is in Denver. Another of our strong churches is in Boulder, in the State of Colorado. So, although we are a small denomination, it goes across the country in major cities and smaller communities, where people of a belief feel that insofar as possible, the law flowing from the original Constitution of the United States should protect their religious freedom, and hopefully their opportunity to earn a livelihood within the American system, which has become, of course, as has been indicated, more pluralistic and more industrialized through the years.

I ask unanimous consent that the cases and regulations which are applicable to this issue be printed at this point in the Record.

AMICUS CURIAE

BRIEF

U.S. Supreme Court, U.S.
FILED
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CLARK

In The
Supreme Court of the United States
October Term, 1985

ESTATE OF DONALD E. THORNTON,
Petitioner,

STATE OF CONNECTICUT,
Intervenor,

v.
Calder, Inc.,
Respondent.

On Writ of Certiorari to the
Supreme Court of Connecticut

BRIEF AMICI CURIAE OF
CONNECTICUT RETAIL MERCHANTS ASSOCIATION
and
CONNECTICUT SMALL BUSINESS FEDERATION

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THE QUESTION PRESENTED

Does Section 10-B(c) of the Connecticut General Statute which requires retailers to provide preferential treatment for Sabbatharians, and thus to change the conduct of their business in conformity with such employees' individual religious practices, violate the Establishment Clause of the First Amendment?¹

¹ Although the issue is cast mainly in constitutional terms, the practical effects of the disputed statute upon employers are acknowledged and then rejected by Ignored. The basic point for the purpose of this brief, the basic constitutional position of the Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON,
*Petitioner,*STATE OF CONNECTICUT,
Intervenor,
v.CALVIN, INC.,
*Respondent,*On Writ of Certiorari to the
Supreme Court of ConnecticutBRIEF AMICI CURIAE OF
CONNECTICUT RETAIL MERCHANTS ASSOCIATION
and
CONNECTICUT SMALL BUSINESS FEDERATION

INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Supreme Court Rule 42(2) in that the written consent of all parties, including that of the intervenor State of Connecticut, has been given and copies duly filed with the office of the Clerk of this Court.

The Connecticut Retail Merchants Association is a voluntary, non-profit association, organized as a corporation under the laws of the State of Connecticut. Its membership covers retailers of every size from small variety stores in Connecticut towns to large chain outlets in the newer suburban shopping centers and metropolitan centers of the state. Like its co-amicus it has a vital interest in being able to provide retail services to persons on a sustaining basis and with proper assistance for customer needs.

The Connecticut Small Business Federation is also a voluntary, non-profit association, organized as a corporation under the laws of the State of Connecticut. Its membership is in excess of 2,000 and includes a wide number of small family-owned "mom and pop" businesses throughout the State of Connecticut, many with only one to three employees.

The questions presented for review in this case raise issues of substantial importance to the Amici Curiae as the outcome thereof will have a major impact upon retailers. The challenged statute is a leftover vestige of the invalidated "Blue Laws" which were aimed only at such businesses. It was enacted in a vacuum as to other statutory employment schemes and is an aberration when viewed in light of employee relations in the industry throughout the state. Thus, the Amici have a direct interest in the issue presented for the Court's consideration in this case, primarily because of its substantial adverse practical impact and burden upon the thousands of retail and independently owned stores and family run enterprises affected by it.

The Amici filing this brief have knowledge concerning the practical effects of the application of this statute upon their business operations. As such, they are uniquely situated to inform the Court of such impact on employers generally under the issues presented, as were

the Amici in *Davis v. Recycled Metals Co.*, 492 U.S. 629, 3 FEP Cases 208 (1971); and *Texas World Airlines, Inc. v. Hardin*, 432 U.S. 63, 14 FEP Cases 1697 (1977), where leave was granted to counsel to file briefs for similar reasons.

STATEMENT OF THE CASE

This case is before the Court on appeal from a decision of the Supreme Court of Connecticut holding that Section 53-30(a) of the Connecticut General Statutes, as amended, is unconstitutional because of a conflict with the First Amendment to the United States Constitution.

The facts as set forth in the briefs of the parties in this case are sufficient for the Amici to present their position as friends of the Court on this appeal.

SUMMARY OF ARGUMENT

The nature of our society today revolves to a great extent around weekend business demands by a substantial majority of the population. Successful retailers and other small business entities of necessity must schedule their work force to meet such shopping trends and provide adequate coverage to customers.

The Connecticut statute involved here is cast in absolute terms and mandates that retailers of all kinds from the large chain operations down to the smallest family run neighborhood and rural stores in the state arrange their operations and work practices specifically in order to meet the religious demands of Sabbatharian employees.

As a result, a substantial burden falls on such employers who often find themselves faced with morale problems arising out of such demands for preferential treatment at the expense of other workers not seeking such special working conditions because of their religious affiliation.

The problem is even more severe for the "bus and pay" type establishments who will have to bear the personal burden of even longer work weeks for themselves or face the prospect of financial ruin if forced to close on weekends.

Further, the Connecticut statute on its face conflicts with the Establishment Clause and is unconstitutional. The State seeks to compel action by private employers that will, in essence, aid members of special religious sects to follow their respective religious practices to the detriment of co-workers who follow other religions or none at all. This result is contrary to the admissions of the Court that have stressed neutrality as the proper constitutional posture for government.

The Court is urged to recognize the practical ramifications of the Connecticut act on retailers and small family owned enterprises. Such an analysis not only outlines the oppressive manner in which the disputed statute functions in the everyday business world, but also exposes its obvious constitutional defects.

The Connecticut Supreme Court twice well understood such parameters and had little difficulty in striking down the challenged law. This Court is urged by the Amici to do the same.

ARGUMENT

A. The Absolute Nature Of The Connecticut Act Imposes A Substantial Burden On Retailers To Arrange Weekend Work Schedules.

The Founding Fathers may not have envisioned that the citizens of this land would shop on all seven days of the week, but the tenor of modern society in America today is one in which the public's demand for around the clock shopping continues unabated.¹

¹It is not unusual to find retailers advertising their main advantage as being "never closed" and open 7 days a week, 24 hours a day. Today's intense retail competition requires that if a mer-

While Saturday has always been the major retail transaction day, Sunday shopping has become increasingly popular. *McGraw v. Maryland*, 386 U.S. 629, 512 (1961) (concurring opinion) (Frankfurter, J.). As a result, most retail stores do their scheduling of employees around Saturday and Sunday.

This Court has also noted very recently that it is "essential" to some employers' businesses to "require Saturday and Sunday work from at least a few employees even though most employees preferred those days off." *Trans World Airlines, Inc. v. Hardison*, *supra* at 56.

Further, with so much of the population working on Monday to Friday schedules, weekends have become a prime time for them to shop. Thus, from the standpoint of the retail merchants, it is particularly necessary that they be open on the weekends and adequately staffed.

The nature of the retail industry thus carries with it inherent problems of work scheduling for employers. Having to meet the inflexible demands of Sabbatharians cannot be done without the development of inequitable personnel practices which will have an adverse effect on the morale of other employees.

The employer has to contend with the scheduling desires of employees who may not be particularly pleased with having to work weekends and be away from their families. In such circumstances, the average retailer tends to try to achieve a measure of fairness by balancing out the burden of weekend coverage. The Caliber rule of scheduling department managers only once every fourth Sunday was in that vein.

²It is to be remembered, it must meet the public's demands on Sundays and arrange the schedule of its employees so as to be able to provide adequate store and customer coverage.

Such efforts become virtually impossible, however, if employees are given "veto rights" over work schedules such as those possible under Section 53-303e. An employer should be entitled to maintain a generally flexible position with regard to structuring its working conditions for its employees absent *valid* statutory limitations or concessions under collective bargaining agreements.

Although the Connecticut statute is continually characterized as a protective shield by Petitioner, in realistic business terms, it places a sword in the hands of employees who are Sabbatarians.

The statute is unique in that it allows individual workers legally to require concessions from their employer as to part of their terms of employment on the single basis of religion. The record in this particular case demonstrates the constitutional infirmity of such a position.

In scheduling its work force, Caldor required its department managers, of whom Thornton was one, to work every fourth Sunday. Most retailers would consider such a schedule to be fair for a store that is open every Sunday. The decedent, in fact worked under such an arrangement without complaint for two years, as did other managers in the store.

It was Thornton, however, who, after this extended period, raised the Sabbath issue. The employer's response was not arbitrary or capricious but rather an offer to try to work out the situation. Caldor was willing to transfer Thornton to a store in Massachusetts, which did not stay open on Sundays. However, he turned this down because of the claimed additional commuting time. He was then offered a downgraded position in his store where he would not have to work Sunday under a collective bargaining agreement, but he also rejected that alternative.

In essence, Thornton's position was that under Section 53-303e he had an *absolute* right not to work on Sunday based upon his personal religious observance. He sought to remove himself from the every fourth Sunday rotation that had been fairly established by Caldor. This meant that the other managers had to assume the burden of working on the Sundays on which Thornton would have been scheduled. Plainly, it was an imposition on them for Thornton to be "protected".

The difficulty faced by an employer in such circumstances is that if other employees similarly claim such an absolute right, management would be unable to maintain an effective schedule of coverage on weekends. If more than one employee seeks such preferential treatment under the statute, how is an employer to choose between them? The door cannot be opened only for the first Sabbatarian. If everyone is off, who will mind the store?

The retail environment with its special working demand is not suited for every person in the general workforce. In our pluralistic economy, with its generally prevalent Monday to Friday work week having become the norm, there is little or no occasion for Sabbatarians to seek employment in industries which would require their services on weekends.

Section 53-303e permits an employee to make inflexible demands and thus distorts the job market.² Such legislation, in the view of the *Amici*, is not only bad constitutional law, but is unsound employee relations.

² In essence, it sets up a "Catch 22" situation for the employer. For example, a prospective employee, simply to obtain employment, may not disclose to a future employer the fact that he or she has such self-imposed limitations. If hired, when the issue later surfaces, it is the employer who is at risk under the statute, particularly since it is also prohibited from making any pre-employment inquiries on this subject.

B. An Even Greater Burden Falls On A Small Family Run Business Under The Disputed Law.

The impact of the Connecticut statute falls most heavily upon the hundreds of small businesses that are commonly referred to as "mom and pop" stores who comprise a majority of the *Amici's* membership. Long a part of the American social fabric, these enterprises are the small neighborhood grocery, tailor and notions stores found in the urban centers as well as the local drug or food stores in rural areas of the country. Connecticut encompasses many such establishments within its borders today.

At one point in our history, these small enterprises were the major source of shopping for people living in their locale. However, with the advent of modern transportation, they have seen many of their customers attracted to the larger retail establishments. Unable to compete price-wise with these larger operations due to their relative volumes, the independent and family owned enterprises have tried to hold their clientele by providing greater and more personalized customer service. Thus, their response, to a large extent, has been to provide more convenient hours for customers to shop thus extending the work day and week for themselves. Others have gone into providing unique goods and services.

The structure of these operations is essentially similar in that they are generally owned and operated by a single family, whose members provide the major portion of service to customers when they are open. Usually the owners supplement such customer coverage by hiring one or two persons from the immediate area to help out, particularly when the owners have other obligations that call them away from their store.

In endeavoring to maintain the kind of coverage that will allow such stores to continue to attract local shoppers,

these families are forced to put in long hours.⁴ A local store that cannot count on its regular help to service customers on Saturdays and Sundays is going to, by default, find the family owners behind the counter on such days after having already put in an exhausting week.

As our society has become increasingly fluid and mobile, their relief no longer comes from relatives who may since have moved away. In the experience of the *Amici*, additional help of one to three workers is drawn from the community.

Under these circumstances, the store owner can find itself in a confrontational situation with its employees under Section 53-303e when a demand is asserted, not to be scheduled to work on the weekend. As observed by this Court:

whenever there are not enough employees who choose to work a particular shift, however, some employees must be assigned to that shift even though it was not their first choice

Trans World Airlines, Inc. v. Hardison, supra, at 80.

Further, the conflict can spread to disputes among the employees themselves particularly in a small neighborhood store where people have to work in close quarters. The dissension generated by preferential treatment required for Sabbatarians is not conducive to a harmonious work environment.

Given the absolute language of the statute, which unlike Title VII covers all retail establishments regardless of size,⁵ the owners of these businesses have few options. One is to cover the weekend customer traffic themselves

⁴ "My parents worked very hard. You had to when running a small business like that, a tailor shop." Stud. Terkel, *American Dreams: Lost & Found*, 1980 (p. 127).

⁵ See 42 U.S.C. § 2000e(b) (1976) which exempts all employers having fewer than fifteen employees.

to avoid violating the statute by compelling their employees to work on their Sabbath and running the risk of a fine under the law.⁶ Alternatively, they could choose not to open on the weekends, but this would probably result in the business failing as many members of the *Amici* are dependent upon the weekend trade for survival. The absolutist statute, under these circumstances, becomes an instrument of subtle oppression if allowed to stand.

C. The Real World Impact Of The Connecticut Statute Highlights Its Constitutional Flaws.

The *Amici* submit that the effect of the disputed legislative enactment is to mandate that employers give preference in working conditions to religionists to the detriment of nonreligionists. This advantage extended under the authority of a penal statute is in plain contradiction to any claimed posture of government neutrality.

The posture of this Court as to the intended scope of the First Amendment to the Constitution is explicit and well-known. Its basic philosophy as to the interfacing of the State and religion is clear. The government must not establish, favor, or support any religion. Neither support nor hostility, but neutrality, is the goal of the religion clause. *Gillette v. United States, et al.*, 401 U.S. 437 (1971).

The Court's inquiry must face this critical focal point. Applied to the state statute here, it raises the question whether the Connecticut legislature is requiring employers to yield in circumstances such as those outlined in Parts A and B above, has violated the government's obligation of neutrality.

⁶ The law carries with it criminal fines of up to two hundred dollars per violation. See Section 53-303e(c).

The language of Section 53-303e does not purport to be neutral, even in tone. Thus, the initial reaction is one that the scales are being decidedly tipped away from the neutral stance of government required by the First Amendment.

When, in the present case, the Connecticut legislature mandates that an employer has to conform its work schedules to meet Sabbatarian's demands, the government transgresses into the forbidden zone delineated by the Establishment Clause.

The essence of any obligation to meet the absolute demands made under Section 53-303e necessarily carries with it preferential treatment for the employee seeking the "protection" of the statute. However, our constitutional system "gives no one the right to insist that in the pursuit of their own interests, others must conform conduct to his religious necessities." Rather, as Judge Hand continued, "we must accommodate our idiosyncrasies, religious as well as secular to the compromises necessary in communal life; and we can hope for no regard for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world." *Otten v. Baltimore & Ohio R.R. Co.*, 205 F.2d 58 (2d Cir. 1958).

The basic effect of the Connecticut statute is to unconstitutionally advance the position of one religionist to follow his religious beliefs vis-a-vis that of every other employee in the particular employer's business, including those who follow *no* religion, a result that appears to be the very antithesis of the neutral approach required of the government.

Further, there is the additional concern that the degree of involvement under the statute would be a continuing one calling for constant surveillance leading to an impermissible degree of governmental entanglement.

The point is well-taken here. Under Section 53-303e(c), any disputes are adjudicated by the State Board

of Mediation and Arbitration, an agency in the State Labor Department, funded by general tax revenues. As in the present case, for the Board to rule on the "validity" of Thornton's claim, it necessarily had to inquire into :1: the nature of the religion of the employee involved and the extent to which it imposed an obligation to abstain from work on the Sabbath; and, (2) the degree of the employee's involvement in the religion to determine the "bona fides" of the request for preferential treatment.

The danger of the State Board becoming an ecclesiastical body⁷ hopelessly embroiled in taking sides while sitting in judgment on disputes of this character is very apparent. As Justice Douglas warned in his dissent in *Weiz v. Tax Commission*, 397 U.S. 664 (1970):

Yet one of the mandates of the First Amendment is to promote a viable pluralistic society and to keep government neutral, not only between sects, but between believers and non-believers.

Id. at 716.

Contrary to Justice Douglas' grave concern, the Connecticut statute unconstitutionally confers preferential treatment to employees holding religious beliefs as opposed to those possessing atheistic or non-orthodox beliefs. It requires employers to award a generally-coveted employment benefit—weekend time off—to those who desire it for religious reasons, to the detriment of others who prefer not to work weekends for secular reasons. Until this case, what one did on his or her weekend was not a matter of concern to others, since it was not at their expense.

The logical extension of Petitioner's contention is to require an employer to make a job available to any employee, on his or her terms, consistent with the "practices" being observed. No religionist should have the

⁷ The Board in the past has sometimes drawn its members from the ranks of the clergy.

power to require an employer's schedule of work for its other employees to revolve around the demands of a Sabbatharian. The *Amici* submit that this constitutes, in effect, a demand for preference in support of religion and is contrary to the Establishment Clause of the First Amendment.

The essence of the Connecticut statute is to give aid and support in the establishment of an employee's self-imposed personal decision to adhere to his or her religious practices. It thus fails to "pass muster" under the tripartite test enunciated by this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 758 (1972).

In using the authority of the government to compel employers and nonreligionist employees to alter their ways to the pattern of other religious beliefs, Section 33-303e necessarily involves the State to a degree that squarely contravenes the ban of the Establishment Clause and thus renders the Connecticut statute unconstitutional.

CONCLUSION

For the reasons stated above, the *Amici Curiae* urge that the decision of the Connecticut Supreme Court below should be affirmed.

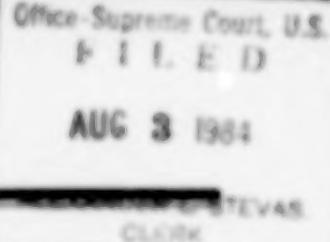
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August 3, 1984

RESPONDENT'S BRIEF



No. 83-1158

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ESTATE OF DONALD E. THORNTON,
Petitioner
v.

CALDOR, INC.,
Respondent

On Writ of Certiorari to the
Supreme Court of Connecticut

BRIEF FOR CALDOR, INC.

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QUESTIONS PRESENTED

- (1) Does the Establishment Clause permit the State of Connecticut to enforce a statute which (unlike Title VII of the 1964 Civil Rights Act and the religious accommodation statutes of virtually every state) compels a private employer to give religious employees whatever weekly day off each designates as a Sabbath, without regard to the hardship that such an absolute requirement imposes on both the employer and other employees?
- (2) Does Title VII of the 1964 Civil Rights Act, which prohibits discriminatory and unequal treatment based on religion, permit a state to require an employer to give preferential treatment to religious employees?
- (3) Should the writ of certiorari be dismissed as improvidently granted now that Connecticut has adopted a new religious accommodation statute that parallels Title VII and avoids the unique constitutional problems of the aberrational statute involved in this case?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1158

ESTATE OF DONALD E. THORNTON,
*Petitioner*v.
CALDOR, INC.,
*Respondent*On Writ of Certiorari to the
Supreme Court of Connecticut

BRIEF FOR CALDOR, INC.*

STATEMENT OF THE CASE

The issue in this case is whether the Constitution of the United States and federal civil rights laws permit Connecticut to compel private employers to give their religious employees whatever weekly day off those employees designate for Sabbath observance, without regard to the hardship that such an absolute requirement imposes on both the employer and other employees. Respondent Caldor, Inc., operates a chain of retail department stores, located mainly in Connecticut, Massachusetts, and New York. Donald E. Thornton, who died in 1982, was a department manager employed by Caldor at its store in Torrington, Connecticut. Thornton's estate, Petitioner here, is pursuing an action initially brought by Thornton against Caldor.

* Caldor, Inc., is a wholly owned subsidiary of Associated Dry Goods Corporation, a publicly traded corporation.

Until 1977, Connecticut had a Sunday closing law assuring that Caldor and its competitors would remain closed on Sundays and that all their employees, both religious and non-religious, would have the day off. Caldor supported that law, and even brought litigation to enforce its requirements against rival retailers who disregarded it. *Caldor's, Inc. v. Bedding Barn, Inc.*, 177 Conn. 304, 417 A.2d 343 (1979).¹ But after this Sunday closing requirement was overturned by the Connecticut Supreme Court—which held that the statute's creation of “arbitrary and discriminatory” exceptions violated the Connecticut Constitution, *id.*—Caldor opened its Connecticut stores on Sundays to compete effectively with other merchants.

In spite of the fact that Sunday rapidly became a high volume sales day, Caldor took major steps to ameliorate the impact of the abolition of Connecticut's Sunday closing law on its employees, including management employees such as Thornton. For example, Caldor agreed with the union representing its rank and file workers that union employees would not be required to work on Sundays, that union workers who chose to work Sundays would be paid premium wages, and that Caldor could hire non-union workers to staff unfilled jobs on Sunday. J.A. 91a. Caldor also sought to minimize Sunday work for store managers like Thornton, who were not members of the union. Adequate store management requires daily coverage by experienced full-time supervisors, and therefore managers were treated differently from rank and file workers; but Caldor sought to accommodate its managers by requiring that they work only one out of every four Sundays. Pet. App. 3a; J.A. 34a-37a.

¹ The legislative and judicial records of the other states where Caldor does business are also replete with statements and briefs filed by Caldor in support of a common day of rest. For example, Caldor filed an *amicus curiae* brief in the case in which the Massachusetts Sunday closing law was sustained. *Zagre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977).

Thornton worked thirty-one Sundays between 1977 and October 1979 without any complaint. Pet. App. 3a. In November 1979, however, Thornton suddenly informed Caldor that Sunday was his Sabbath and that he would no longer report for work on that day. Caldor made sustained and serious efforts to resolve the conflict. Over a period of four months—during which Thornton refused to show up for work on any Sunday, provoking dissension and job actions from resentful fellow-workers, J.A. 38a, 42a, 45a—top Caldor executives gave sensitive consideration to Thornton's situation, arranged repeated meetings with him, and made a series of concrete and flexible proposals in an attempt to reach an accommodation. In particular:

- (1) Caldor offered to transfer Thornton to a managerial position at a store one hour away in Massachusetts, a state that still had a Sunday closing law and where Thornton would therefore not have been required to work on Sundays. Pet. App. 3a; J.A. 56a, 59a. Thornton rejected this proposal because he objected to the commute (although the distance was comparable to that for other Caldor executives) and would not consider moving. Pet. App. 3a.
- (2) Since Thornton wished to use many Sundays to visit relatives in New Jersey, Caldor offered to rearrange particular Sunday assignments with other management personnel to accommodate specific Sunday excursions. Thornton rejected this proposal because he wanted every Sunday off, not simply a rearranged schedule. J.A. 65a.
- (3) Caldor offered to continue Thornton's employment at the Torrington, Connecticut, store in a non-supervisory capacity as a member of the employee union, whose contract provided for nonattendance at work on Sunday. Thornton rejected this proposal because it would have entailed a decrease in pay. Pet. App. 3a.

In March 1980, when Calder informed Thornton that his rejection of these proposals left the company no alternative but to assign him to a nonsupervisory position, Thornton resigned.

In May 1980, Thornton commenced legal action against Calder. Thornton elected not to seek relief under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (1981) (hereinafter "Title VII"), which requires an employer to "reasonably accommodate" to the religious practices of its employees where there is no "undue hardship on the conduct of the employer's business." Instead, Thornton brought an action under Connecticut General Statute § 53-303e (hereinafter the "Sabbath Law"), which gives Sabbath observers an absolute and unqualified right not to work on that day, without regard to the nature of the employment position in question or the burdens that such an absolute requirement imposes on both the employer and fellow employees. The Sabbath Law provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such a day." Conn. Gen. Stat. § 53-303e(b). Under the statute, "an employee's refusal to work on his Sabbath shall not constitute grounds for dismissal," *id.* § 53-303e(b); nor may it constitute grounds for refusal to hire, since "[n]o employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath," *id.* § 53-303e(d).

Thornton complained to a state administrative body, the State Board of Mediation and Arbitration (hereinafter "the Board"), alleging wrongful dismissal. *Id.* § 53-303e(c). Calder responded that its actions did not come within the proscriptions of the Sabbath Law, that Thornton had failed to establish that he was a Sabbath observer, and that the statute violated the Connecticut Constitution and the Establishment Clause of the Constitution of the United States. J.A. 29a. Specifically, Calder argued that the Establishment Clause barred

Connecticut's Sabbath Law because, unlike Title VII, it created an absolute requirement that employers comply with the religious preferences of their management workers without providing any defense of reasonableness or hardship. J.A. 30a-31a. The Board, after stating that it lacked jurisdiction to rule on the constitutional issues, granted Thornton relief by a 2-1 vote. In particular:

(1) Based on Thornton's testimony that "Sunday was his Sabbath" and his extensive testimony "as to what he would do and would not do as an observance of his Sabbath," the Board concluded that "Mr. Thornton had justified to the panel, that, in fact, his Sundays were his day of Sabbath." J.A. 10.¹

(2) The Board also concluded that Thornton had been "discharged" for refusing to work Sundays, and had not resigned. This resolved the statutory issue in the proceeding since, as the Board concluded: "If a discharge for refusal to work Sunday hours occurred and Sunday was the Grievant's Sabbath, said act violated Section 53-303(e) of the Connecticut General Statutes." J.A. 11a.²

The Connecticut trial court confirmed the Board's decision, briefly discussing and rejecting Calder's Establishment Clause argument. J.A. 22a-23a.

¹ Petitioner's Brief states that Thornton "explained that when he was forced to work on Sundays he had taken the money he earned on Sundays and given it to his church 'in order to live with a decent conscience.'" Pet. Br. 4. The record, however, does not support this characterization:

"Q: What did you do with your earnings from Sunday labor?
A: [Thornton]: I had given some of my money to charitable causes. I used some of it for my own personal gain."
J.A. 28a.

² The Board awarded back pay and fringe benefits for the period between the "discharge" and the arbitration award, minus the unemployment compensation that Thornton had received.

The Connecticut Supreme Court unanimously reversed, concluding that the Sabbath Law violates the Establishment Clause.¹ Applying the three-part test set down by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Connecticut Supreme Court determined, first, that the Sabbath Law does not reflect a secular legislative purpose. The court contrasted the Connecticut statute with the Sunday closing laws upheld by this Court in *McGowen v. Maryland*, 366 U.S. 420 (1961). The Maryland statute, the Connecticut Supreme Court recognized, had a "valid secular purpose of providing a common day of rest for both religious and nonreligious citizens." Pet. App. 14a. The Connecticut Sabbath Law, by contrast, gives only certain employees a right to "designate" a particular day of rest—only those employees for whom that day is a Sabbath "specifically mandated by the tenets of a particular religion" and "deemed holy under the beliefs of various religious sects."² The Connecticut legislature's "unmistakable purpose," the court concluded, was religious and sectarian. Pet. App. 14a.

Applying the second prong of *Lemon's* Establishment Clause test, which requires that a law have "a primary effect that neither advances nor inhibits religion," the Connecticut Supreme Court recognized that "not every law that confers an 'indirect,' 'remote' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Pet. App. 14a, quoting *Committee for Public Education v. Nyquist*, 413 U.S. 736,

¹ Justice Silber agreed with the majority's conclusion that the Sabbath Law violates the Establishment Clause but would not have reached the issue since he thought that the Board should have ruled upon it first. Pet. App. 11a-11a. The court did not reach the state constitutional claim. Pet. App. 11a.

² The court also noted that subsection (a) of § 133-300a, which prohibits employment for more than six days in any calendar week, adequately addresses the valid secular purpose, upheld in *McGowen*, of forbidding uninterrupted labor for all employees. Pet. App. 13a.

771 (1973). The Connecticut Supreme Court emphasized, however, that the Sabbath Law "confers its 'benefit' on an explicitly religious basis." "Workers who do not 'observe a Sabbath' may not avail themselves of the benefit provided by the subsection, and are not entitled to take a specific day off with impunity." Thus, the court concluded, the Sabbath Law "possesses the primary effect of advancing religion." Pet. App. 15a.

Finally, the Connecticut Supreme Court found the Sabbath Law "most troublesome" when measured under the third prong of *Lemon's* Establishment Clause analysis, which forbids excessive governmental entanglements with religion. In determining, as a matter of state law, the inquiry contemplated by the Connecticut statute during enforcement proceedings, the court drew upon its understanding of the legislature's intent, as well as upon the record of the proceeding before the Board in this case. The court concluded that an extraordinary degree of government intrusion was involved:

Inevitably, as employers challenge the sincerity of employees' Sabbath observance, the board's inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may fairly be labelled 'observance of Sabbath.' . . . The enforcement mechanism of subsection (c), therefore, is exactly the type of 'comprehensive, discriminating and continuing state surveillance'; *Lemon v. Kurtzman*, supra, 619; which creates excessive governmental entanglements between church and state. Pet. App. 15a-16a.

Thornton's estate petitioned this Court for a writ of certiorari, which was granted on March 4, 1984. After the grant of certiorari, the Connecticut legislature enacted a new, more flexible statute which parallels Title VII and requires that employers "reasonably accommodate" the religious observances of their employees only where doing so will not cause "undue hardship." Conn. Gen. Stat. § 46a-51(18).

SUMMARY OF THE ARGUMENT

The Bible commands: "Remember the Sabbath day and keep it holy." The issue in this case is whether the government may lend its strength to that commandment by requiring private employers to honor the Sabbath dictates of their religious employees, without *any* regard to the burdens this imposes on the employer and other employees. Under a Constitution that prohibits laws "respecting an establishment of religion," and under settled precedent of this Court, the answer must be no.

Connecticut's absolutist Sabbath Law may well remove some obstacles to religious observance; but the entire history of the Establishment Clause is about recognizing limits on what government may do to promote the scope of religious exercise. The Sabbath Law exceeds these limits in three main respects. First, it is not a neutral law; indeed, it requires private employers to implement a regime of blatantly unequal treatment. The statute gives traditional Sabbath observers an absolute and unqualified right to designate a particular weekly day off, but denies that right to all other employees, including those who have equally strong non-religious reasons for wanting a particular day off. In businesses like the retail trades, where weekend work is the lifeblood of the enterprise, this inequality is exacerbated because the absence of Sabbath observers will require other employees to work a disproportionate number of weekend days to take up the slack. They will be forced to sacrifice the distinctive advantages seen by most Americans, both religious and non-religious, in having weekend days off from work. Far from being an antidiscrimination law, as Petitioner suggests, the Sabbath Law discriminates among employees.

Second, because it is absolutist, the Sabbath Law involves unconstitutional government coercion in the name of religion. By forcing employers and employees to yield to Sabbath-observing employees, the statute compels some

people to sacrifice their own legitimate interests in order to facilitate others' religious practices. Employers, for example, must abandon work schedules necessary for their businesses and must endure disruption and economic burden. They must also become enmeshed in the thoroughly distasteful process of implementing the state's religious-based policy: measuring the religious convictions of their employees; making and explaining religious-based staffing decisions; and containing controversy and conflict about these issues in their workplaces.

Most significantly, the Connecticut statute is extreme and aberrational in its coercive requirements: it compels deference to Sabbath-observing employees in an absolute manner, without even permitting an inquiry into the degree of cost and hardship imposed on the employer and other employees. The Sabbath Law gives Sabbath observers a "veto" that automatically trumps all legitimate secular interests of the employer and other employees. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982). The particular needs of the business, the particular position held by the employee, the particular hardship and inequalities imposed on other workers—all are legally irrelevant. This lends the strength of the state to religion to an impermissible degree. Moreover, it sends a message that the government deems the values of Sabbath observance to be more important than all competing secular concerns. This amounts to an impermissible government "endorsement" of a religious practice.

By embracing absolutism in the area of religion, Connecticut has departed from one of this Court's most fundamental First Amendment teachings: that issues involving religion must be resolved with flexibility, mutual accommodation, and attention to context, not by "absolutist approaches." *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980). This Court's rejection of "absolutist approaches" acknowledges the com-

peting values in our society, including both religious and secular ones. Connecticut's Sabbath Law goes too far because it insists on the absolute preeminence of the religious point of view, without regard for other factors that exist in particular contexts. In this respect, however, Connecticut's absolutist approach is altogether aberrational. Both Title VII of the Civil Rights Act and the statutes of virtually every other state address the religious accommodation issue with a standard of "reasonableness" and an exception for "undue hardship." Thus, the constitutional principle that condemns Connecticut's law does not condemn virtually any other current law.

The Sabbath Law offends the Establishment Clause in a third way: by excessively entangling the government with religion. As the Connecticut Supreme Court determined—and as the Board hearings in this case made clear—the Sabbath Law contemplates inquiries into both the tenets of the employee's religion as well as the scope of his or her own particular observance. This degree of governmental intrusiveness exceeds what the Establishment Clause permits.

It is not necessary, however, for this Court to reach the Establishment Clause issues in this case. Whatever the Establishment Clause may prohibit, Title VII of the Civil Rights Act prohibits preferential advantaging of religious employees just as it prohibits prejudicial disadvantaging of them. Since the absolutist Sabbath Law extends preferential treatment to religious employees, it is explicitly preempted by Title VII itself and may not be applied to Caldor.

Alternatively, the writ of certiorari in this case should be dismissed as improvidently granted. Since the writ was granted, Connecticut has adopted a "reasonable accommodation" statute which extends strong protection to religious employees without involving the distinctive constitutional infirmities of its absolutist and aberrational Sabbath Law. Because of this statutory development, the case no longer merits this Court's review.

ARGUMENT

I. THE CONNECTICUT SABBATH LAW, WHICH IMPOSES AN ABSOLUTE REQUIREMENT ON PRIVATE EMPLOYERS TO DEFER TO THE SABBATH PRACTICES OF EMPLOYEES WITHOUT REGARD TO THE HARSHIP THAT SUCH A REQUIREMENT IMPOSES ON THE EMPLOYER AND OTHER EMPLOYEES, VIOLATES THE ESTABLISHMENT CLAUSE.

A. Three Distinctive Features Of Connecticut's Sabbath Law Are Inconsistent With The Establishment Clause.

Three different features of the Connecticut statute offend the Establishment Clause.* First, the statute imposes on private employers an absolute and unqualified requirement to facilitate religious observance by others, without allowing any weight to be given to any competing secular concerns of the employer or other employees. Second, by creating an absolute right to designate a day off for Sabbath observance in particular, the statute impermissibly favors religion over non-religion and favors certain religions over other religions. Third, as definitively interpreted by the Connecticut Supreme Court, the Connecticut Sabbath Law requires the government to become unacceptably enmeshed in investigating religious belief and monitoring religious observance.

Because of these distinctive features, the Sabbath Law is inconsistent with what this Court has identified as the basic values embodied in the Establishment Clause. The Sabbath Law is also flatly inconsistent with the three criteria set forth in *Lemon v. Kurtzman* as tools for

* "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *Centwell v. Connecticut*, 310 U.S. 294, 303 (1940).

measuring whether those core Establishment Clause values are satisfied in a particular case: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612-13 (1971) (citations omitted).

I. Connecticut's Sabbath Law Impermissibly Establishes an Absolute Requirement Compelling Private Employers to Deter to the Religious Dictates of Their Employees.

The first constitutional deficiency of the Sabbath Law is the absolute and unqualified nature of its requirement that private parties sacrifice legitimate interests to facilitate the religious observance of others.

(a) The Establishment Clause Restricts Government Coercion on Behalf of Religion.

The background and history of the First Amendment make clear that the Establishment Clause was directed precisely at government efforts to compel some people to support and facilitate the religious activities of others. While a common form of detested government compulsion was taxation to support others' religious practices, all forms of direct compulsion were condemned. See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 8-16 (1947). As stated in the famous antecedent of the First Amendment, the Virginia Bill for Religious Liberty, "No man shall be compelled to frequent or support any religious worship . . . nor shall [he] be enforced, restrained, molested, or burthened in his body or goods." 12 Hening, Statutes of Virginia (1823). See also J. Madison, Memorial and Remonstrance, in 2 Writings of James Madison 183 (G. Hunt, ed. 1910). This position reflected both the intellectual legacy of the Enlightenment, with its insistence on the privatization of religion, and centuries of lived experience demonstrating how often government

activism in the name of religion leads to ugly social conflict and oppression, as well as to a degrading dependence of church on state.⁷ In the words of Justice Frankfurter, "the long colonial struggle for disestablishment" was "the struggle to free all men, whatever their theological views, from state-compelled obligation to acknowledge and support state-favored faiths." *McGowan v. Maryland*, 366 U.S. 420, 460 (1961) (separate opinion).

Recognizing that these were the "feelings which found expression in the First Amendment," *Everson*, 330 U.S. at 11, courts have repeatedly stated that government coercion to support or facilitate religious activity is a central evil that the Establishment Clause seeks to eliminate.⁸ As Judge Learned Hand said in a famous passage,

⁷ See, e.g., S. Abell, *A Religious History of the American People* (1972); E. Ballyn et al., *The Great Republic* (1977); M. Marty, *Pilgrims in Their Own Land* (1984); H. May, *The Enlightenment in America* (1976); L. Pfleger, *Church, State and Freedom* (1963). Numerous opinions of this Court have relied on this history and its teachings. See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 8-16 (1947); *McGowan v. Maryland*, 366 U.S. 420, 464-66 (1961) (separate opinion of Justice Frankfurter); *Eugel v. Vitale*, 379 U.S. 421, 423-36 (1962); *Arlington School Dist. v. Schempp*, 374 U.S. 292, 293-37 (1963) (Brennan, J., concurring); *Waltz v. Tax Commission*, 397 U.S. 664, 676-80 (1970).

⁸ See *McGowan v. Maryland*, 366 U.S. 420, 433 (1961) ("to use the state's coercive power to aid religion" violates the Establishment Clause); *Zorach v. Clausen*, 343 U.S. 306, 311, 314 (1952) (government "may not . . . force one or more religion on any person," and "if in fact coercion were used, . . . a wholly different case would be presented"); *Everson v. Board of Education*, 330 U.S. at 8 (early settlers sought "to escape the bondage of laws which compelled them to support and attend government-favored churches . . . [Under the Establishment Clause], no tax in any amount, large or small, can be levied to support any religious activities"). See also *Eugel v. Vitale*, 379 U.S. 421, 430-31 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 273, 286-87 (1948); *Centzou v. Connecticut*, 319 U.S. 294, 303 (1943); *cf. Marsh v. Chambers*, 393 U.S. 360, 3841 (1968) (Brennan, J., dissenting); *Valley*

our constitutional system "gives no one the right to insist that in the pursuit of their own interests, others must conform their conduct to his own religious necessities." *Otten v. Balt. & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953). Therefore, Petitioner does not advance its case by characterizing the Connecticut Sabbath Law as an effort to make religious observance easier and to "promote . . . the fullest possible scope of religious liberty." Pet. Br. 12, 22. See also *infra* pp. 25-28, 42-43. The entire history of the Establishment Clause is about recognizing limits on what government may do to force some people to sacrifice their own legitimate interests to facilitate the religious exercise of others.

(b) The Sabbath Law's Coercion Is Absolute.

The present case does not require this Court to decide the maximum extent to which government may compel

Forge College v. Americans United, 484 U.S. 464, 500-505 (1982) (Brennan, J., dissenting).

As if oblivious to its relevance to the present case, the Solicitor General concedes that "the state may not use coercion to exact support for religious institutions or practices." SG Br. 25. Elsewhere in his Brief, the Solicitor General suggests that the Establishment Clause is irrelevant to Calder's objection to the Connecticut statute because, the Solicitor General says, Calder's "sole concern is that its cost of doing business" may be increased by Connecticut's requirements and "no one's religious rights or interests are infringed by the statute." SG Br. 23 (emphasis in original). This mischaracterizes both Calder's interests and the interests embraced by the Establishment Clause. "Religious rights" that are shared by every American are offended when the government exceeds the boundaries of the Establishment Clause. Here, indeed, the burdens inflicted on Calder include the offensiveness and awkwardness of being drafted to implement the state's religious-based policies and becoming enmeshed in divisive matters of religion. In any event, as suggested by the historic objection to taxation and by the reference to "goods" in the Virginia Bill for Religious Liberty, the evils addressed by the Establishment Clause include economic coercion to support religion as well as coercive interference with religious practice itself. The Solicitor General also totally ignores the burdens that the Sabbath Law imposes on those Calder employees who do not observe a Sabbath.

private employers affirmatively to accommodate religion. The Connecticut statute is an extreme and aberrational one, and its extreme features are what make it clearly unconstitutional. The Sabbath Law involves impermissible coercion because its requirements are absolute and unqualified: Connecticut compels private employers to yield to the Sabbath observances of their employees under all circumstances, without regard to the hardship or cost that this imposes on the employer or other employees. This absolutism distinguishes the Connecticut Sabbath Law from Title VII, which requires that employers "reasonably accommodate" religious observance when doing so does not cause "undue hardship,"¹⁸ and from the religious "accommodation" statutes of virtually every other state.¹⁹ The Connecticut statute insists that

¹⁸ See *infra* pp. 18-19, 23-24, 43-47.

¹⁹ Petitioner, Intervenor, and amici repeatedly state that Connecticut's statute is like the laws of most other states, and they suggest that those other states' laws will be called into question if Connecticut's Sabbath Law is struck down. See, e.g., Pet. Br. 18-19 & n.7; Int. Br. 83 n.26; SG Br. 7 n.12. This assertion is wrong. In fact, Connecticut's statute is strikingly different, and different in a constitutionally relevant way. With at most two exceptions (Missouri and Kentucky), the cited state laws do not impose an absolute requirement, as the Connecticut Sabbath Law does, but are religious accommodation statutes requiring at most a duty of reasonable accommodation and exempting employers when accommodation would impose undue hardship. Moreover, for the most part, those other state laws impose a more general duty to accommodate employees' religious observances and practices, rather than singling out for protection Sabbath observance alone. See United States Motion for Additional Time for Oral Argument and Divided Argument 2 (conceding that the laws of the other states are "characteristically more like Title VII than like the Connecticut law"). Thus, a decision striking down the Connecticut statute on the grounds argued in this Brief would not require the invalidation of either Title VII or virtually any other state law.

In light of the extravagant mischaracterizations of various state statutes in the opposing briefs, an Appendix to this Brief sets forth a short summary of each state law cited by Peti-

Sabbath religious concerns automatically and invariably trump all legitimate secular interests in the workplace. In spite of Intervenor's belated efforts to suggest otherwise, there is simply no doubt that Connecticut's is an absolutist law, imposing on some citizens an unqualified duty to comply with the religious practices of others.¹¹

tioner, Intervenor or the Solicitor General. We note at this point only two examples. Intervenor states that New York's religious accommodation provision is "nearly identical in scope" to Connecticut's Sabbath Law, Int. Br. 34 n.29. But far from giving Sabbath observers an absolute right not to work on their Sabbath, the New York statute in question (N.Y. Exec. Law § 296.10) explicitly exempts employers when the employee's presence is "regularly essential" for the "normal performance" of duties or where compliance would otherwise impose an "undue economic hardship." Curiously, although Intervenor states that "New York's religious accommodation provision . . . is set out fully in Appendix D" to its brief, *id.*, the Appendix omits subsection "v" of the New York law, which contains the undue hardship qualification. See also State Division of Human Rights ex rel. Clarke v. Carnation Co., 86 App. Div. 2d 977, 448 N.Y.S. 2d 330 (1982), cert. denied, 103 S.Ct. 1194 (1983).

Similarly, Intervenor describes California's accommodation law as "identical" to Connecticut's, Int. Br. 31-32 & n.19. In fact, the wording of California's law is altogether different from Connecticut's, and in any event the California law has been read by the Supreme Court of California as requiring only reasonable accommodation short of undue hardship. *Roskina v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 882, 134 Cal. Rptr. 947 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979).

¹¹ Intervenor, who did not participate in the lower court proceedings even though it had notice and opportunity to participate, suggests the possibility that the Sabbath Law might actually be read to contain "the kind of 'undue hardship' defense that is contained in Title VII" and, like Title VII, may require only "reasonable" accommodations. Int. Br. 16 n.8. Compare SG Br. 21 n.27 with SG Brief in Support of Petition II and SG Motion for Additional Time for Oral Argument and For Divided Argument 2. This suggestion is absurd, and is contrary to both the unambiguous words of the statute itself, the definitive construction given to the statute

The consequences of this absolutism are apparent. The Connecticut statute compels an employer to give Sabbath observers a particular day off without any consideration of the substantial secular interests that are sacrificed. For example, there is no special consideration or exception for supervisory employees, such as Thornton, or for highly skilled technicians. There is no exception for special circumstances, such as the Friday Sabbath observer employed in a school with a Monday through Friday schedule. There is no special consideration if a high percentage of an employer's workforce seeks the same day off. There is no exception for employers whose work schedules may reflect their own religious practices. There is no exception when following the dictates of Sabbath observers would cause the employer substantial economic burdens (even if the consequence is bankruptcy) or when the employer's compliance requires the imposition of significant burdens on other employees who have to substitute for the Sabbath observer. There is no consideration of whether the employer has made reasonable accommodation proposals, or whether other alternatives are open to the employee, or whether the employee shows any flexibility themselves. All such factors are simply legally irrelevant.

by the state Arbitration Board and the Connecticut courts (whose constructions, of course, are binding on this Court), and by every party in this case below. (Indeed, while Petitioner obliquely joins Intervenor's suggestion, Pet. Br. 55, at every stage below Thornton himself emphasized, and took full advantage of, the Sabbath Law's clearly absolutist quality.) A more recent decision of the Board explicitly reaffirms that Section 53-31b(c)(b) creates an "absolute right." *G. Fox & Co. v. Stroblitz*, Conn. Bd. Arb. & Med. No. 81BD-A-489 (Nov. 17, 1982). The Sabbath Law is simply not Title VII in disguise, and at this late date cannot be dressed up to be. Connecticut's recent adoption of a "reasonable accommodation" statute paralleling Title VII—a state statute that is inapplicable to Thornton's cause of action (*see infra* pp. 47-50)—shows that the Connecticut legislature knows how to write a reasonable accommodation statute when it wants to.

The absolutist requirement of Connecticut's Sabbath Law poses distinctive problems for retail employers such as Caldor, which regularly operate on the weekend. In the retail trades (or other leisure time businesses), weekend work is the economic lifeblood of the enterprise.¹¹ These businesses must be staffed on weekends to meet consumers' needs; coverage by experienced supervisors like Thornton is essential. An absolute government requirement that religious workers always be given their weekend Sabbath off is a dramatic intrusion on such enterprises in the name of religion. Sabbath observers cannot routinely be given weekend days off without either imposing significant costs on the employer or requiring extra weekend work from employees who are not Sabbath observers, people who are likely to have equally strong desires to have those weekend days off. Moreover, compelling retail employers to hire and retain weekend Sabbath observers is unnecessary when other available workplaces have a Monday through Friday work week that can easily accommodate the preferred work schedules of Sabbath observers.¹²

In the present situation, evidence concerning Caldor's accommodation efforts and the burdens to Caldor and other employees of complying with Thornton's demands¹³ would have been centrally important in evaluating

¹¹ For example, Caldor's weekend sales constitute approximately 28% of its total sales.

¹² Where such alternatives exist, a Sabbath observer required by one employer's reasonable work schedule to work on his Sabbath is hardly compelled to choose between work and his religion, as Petitioner suggests. Pet. Br. 29. The conflict can be avoided by seeking employment at one of the many alternative workplaces not centrally dependent on weekend work.

¹³ See *supra* pp. 2-3. The record also reveals that when Thornton refused to work Sundays, Thornton's fellow workers not only failed to volunteer to replace him, but actually threatened "rebelion" and began refusing to work on Sundays themselves. J.A. 38a, 41a, 44a-46a.

whether Caldor was liable under Title VII.¹⁴ But under the absolutist and aberrational Connecticut statute—which Thornton chose to invoke instead of Title VII—such evidence is totally irrelevant, not even open to inquiry. To invoke the phrase this Court used in *Larkin v. Grindoff's Den, Inc.*, 459 U.S. 114, 117, 122 (1982), Connecticut has given Sabbath observers like Thornton an absolute "veto" over all legitimate secular interests that an employer and other employees may have.

(c) The Sabbath Law's Absolutism Violates the Establishment Clause.

Because it is absolutist, Connecticut's Sabbath Law involves unconstitutional government coercion in the name

¹⁴ The practical consequences of the Connecticut statute are underscored by numerous Sabbath cases actually decided under Title VII. The employer prevailed in many of these cases after establishing that it had made reasonable accommodation and that further deference to Sabbath observance would impose "undue hardship" on the employer and other employees. E.g., *Frost World Airlines, Inc. v. Hardison*, 453 U.S. 48 (1977); *WREN v. T.J.M.E.—D.C.*, 505 F.2d 441 (5th Cir. 1979); *Jordan v. North Carolina National Bank*, 545 F.2d 73 (4th Cir. 1977); *Chrysler Corp. v. Mass.*, 541 F.2d 1292 (5th Cir. 1977), cert. denied, 434 U.S. 1089 (1978); *United States v. City of Albuquerque*, 545 F.2d 119 (10th Cir. 1976), cert. denied, 433 U.S. 949 (1977); *Jackson v. United States Postal Service*, 497 F.2d 1238 (5th Cir. 1974); *Dixon v. Omaha Pub. Power District*, 395 F. Supp. 1282 (D. Neb. 1974); Case No. 83-28, EEOC Dec. (CCH) 14816 (July 29, 1983). See also *Bettis v. Wilkes Lumber Co.*, 23 Encl. Pres. Dec. (CCH) 111,262 (June 13, 1980) (in a business where "Saturdays [were] the busiest business day" a refusal to work on Saturday "cannot reasonably be accommodated"). Had these cases been brought under Connecticut's Sabbath Law, the employer would have lost, in spite of a judicial finding that further accommodation efforts would impose "undue hardship."

Significantly, there is no evidence before this Court demonstrating any discrimination in Title VII or any strong public need for an absolutist law. There is, for example, no evidence that a reasonable accommodation/undue hardship provision is insufficient in preventing discrimination or in removing unfair obstacles to employment and religious observance.

of Sabbath observance. Under the Establishment Clause, the government may not compel private parties to defer to the religious observance of others without even permitting inquiry into the degree of burdens imposed, as if religion were the only relevant value. While the government may insist that religion be treated in a spirit of accommodation, that spirit is one of reasonable and mutual forbearance; it does not permit absolutist solutions. Justice White sounded this theme for the Court in *Committee for Public Education v. Regan*, 444 U.S. 645, 662 (1980) (emphasis added):

[Establishment Clause cases] stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes.¹¹

When the government empowers religion with an absolute trump card, it does more than acknowledge the place of religion as one significant strand within "the best of our traditions" or as part of the "diversity and

¹¹This theme was taken up by the Chief Justice only last Term: "This history may explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause . . . In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . In each case the inquiry calls for fine-tuning; no fixed, per se rule can be framed . . . The Clause creates a 'flexible, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Lynch v. Donnelly*, 104 S.Ct. 1286, 1293-94 (1984) (quoting *Levitt*). See also *Walwyn v. Walter*, 433 U.S. 229, 238 (1977) (Powell, J., concurring in part and dissenting in part) ("Court's First Amendment decisions have rejected 'blind absolutism'); *Burke v. Clemons*, 545 U.S. 304, 314, 315 n.8 (1995) ("First Amendment questions are ones of 'degree,' turning on 'differentiating particularities' of each case").

pluralism" of our society. *Lynch*, 104 S.Ct. at 1361. Rather, the government singles out religion and insists that it override all other secular interests of employers and other employees.¹² Whenever a conflict emerges between Sabbath observance and those legitimate secular interests, Connecticut lends the strength of the state to the religious interests. It leaves no "play in the joints," *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), for secular values. Such an absolutist law offends the Establishment Clause by compelling deference to Sabbath observance even when the costs of compliance are at the extremely burdensome end of the continuum. In addition, by making an inquiry into costs legally irrelevant, the state offends the Establishment Clause by sending a message: Religious interests are more important than secular interests. Whether or not Connecticut's message amounts to actual encouragement of Sabbath observance—and it may—the state is certainly conveying the message that Sabbath values rank higher whenever they conflict with competing secular workplace values. Connecticut's message is underscored by the fact that the statute's absolutism forecloses even an inquiry into the strength of those competing secular concerns; employers are simply told that those concerns are irrelevant. This moves beyond "acknowledgment" of religion to unacceptable gov-

¹²In *University of California Regents v. Bakke*, 438 U.S. 265, 318 (1978), Justice Powell distinguished between considering race as a "factor" in an admissions decision (which is sometimes permissible) and treating race in a way that "foreclosed from all consideration" all other factors (which is forbidden). There is an analogy here: even if the government may require private employers to consider accommodating their employees' religious practices as one "factor" when making business decisions, the government may not require that the employer treat religion in an absolutist fashion that automatically "foreclose(s) from all consideration" legitimate secular factors.

ernment "endorsement" of religion. *Lynch*, 104 S.Ct. at 1366, 1368-69 (O'Connor, J., concurring).¹⁹

This analysis also indicates one of several reasons why the Connecticut Supreme Court was correct in concluding that the *Lemon* test has not been met. See also *infra* pp. 33-34, 36-38. The fact that the Connecticut statute imposes an absolutist requirement that Sabbath observance automatically trumps all secular factors shows that the Sabbath Law lacks any clearly "secular purpose," and it therefore violates the first prong of *Lemon*. Even if government may validly require that religion be considered as one factor among many others in an employer's business decision (just as it is one among many factors in our society), a religious purpose is established when religion becomes more than a factor and becomes a "veto." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117, 122

¹⁹ The Joint Amicus Brief of the American Civil Liberties Union (ACLU) and American Jewish Committee (AJC) agrees with our position that Connecticut's absolute rule is unconstitutional. But starting from the view that a "reasonable accommodation" rule would be constitutional, the ACLU-AJC ask this Court to remand the case to the Connecticut system to determine whether Calder has, in fact, "reasonably accommodated" Thornton's Sabbath. ACLU-AJC Br. 25-26. This latter suggestion has no legal justification. The fallacy in the suggestion is that Connecticut's Sabbath Law does not contain a "reasonable accommodation" requirement—or for that matter any other standard suggesting what degree of accommodation short of an absolute duty might be required. See *supra* note 11. The ACLU-AJC would transform each proceeding under the Sabbath Law into a hearing which invokes a standard that Connecticut pointedly did not adopt. The ACLU-AJC's suggestion that the tribunals below only considered the statute "on its face," and should now consider it "as applied," uses legal jargon to mischaracterize what happened below. *Id.* The Board and the Connecticut Supreme Court read and applied the Connecticut statute as creating an absolute right that made evidence of "reasonable accommodation" or "undue hardship" simply legally irrelevant. The statute was held unconstitutional "on its face" only in the sense that under the statute itself liability does not turn on factual evidence about the hardship of accommodations in particular applications.

(1982).²⁰ Similarly, because the Sabbath Law is absolutist and automatically subordinates the effectuation of all secular interests to religious interests, its primary effect is clearly to advance religion, in violation of *Lemon*'s second prong. Thus, the Sabbath Law is not a permissible "accommodation" law but an impermissible "establishment."²¹

This Court has already recognized that the fairness of a religious "accommodation" law turns on the degree to which accommodation is required. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court construed Title VII's "reasonable accommodation"/"undue hardship" requirement as imposing only minimal duties on employers. Far from requiring deference to an employee's religious observance without regard to cost at all, as the Sabbath Law does, this Court determined that Title VII requires adjustments only when *de minimis* costs are incurred. Although *Hardison* did not decide any constitutional issues, the Court affirmed that "[t]o require [an employer] to bear more than a *de minimis* cost in order to give [its employees] Saturdays off is an undue hardship" and also "constitutes unequal treatment

²⁰ The recent creche case is consistent with this analysis. The creche is a religious symbol; but when displayed along with secular artifacts such as reindeer, Santa's sleigh, cutout animals and candy-striped poles, the entire display can be seen as serving the "secular purpose" of recognizing a traditional National Holiday. *Lynch*, 104 S.Ct. at 1363. Similarly, an accommodation statute that places religion among a multitude of other factors in an employer's business decision can also be seen as essentially a neutral and permissible recognition of the multi-faceted nature of our country's traditional values. See *supra* note 17.

²¹ As noted before, since neither Title VII nor virtually any analogous state law contains an absolutist requirement, virtually no other law would be called into question by the constitutional principle that condemns Connecticut's law. The Solicitor General concedes as much: "If there is a constitutional defect in Section 53-30b(e)(b), it is its absolutist character—a character that Title VII and the parallel state statutes do not share." SG Br. 24. See also ACLU-AJC Br. 13-19.

of other workers." *Id.* at 84.²¹ Moreover, the dissenters in *Hardison*, who would have read Title VII's duty to accommodate somewhat more broadly, stated that "important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observers." *Id.* at 90 (Marshall, J., dissenting). The absolutist Connecticut statute goes even further.²²

There is a final reason for rejecting the absolutism of Connecticut's Sabbath Law. As the many briefs before the Court in this matter attest—and as the debate within this Court in *Hardison* itself reveals—people perceive a religious accommodation case like Thornton's in many different ways: as a case about government intrusion on employer liberty; as a case about religious observance; as a case about government empowerment of religion; as a case about equalizing employment opportunities; as a case about unequal treatment of religious and non-religious workers. These multiple perspectives

²¹ The narrow construction this Court gave Title VII in *Hardison* may well have been an effort to avoid constitutional questions that a broader requirement would have raised, since Petitioners and various amici had mounted a strong constitutional challenge to Title VII. Where the costs imposed on the employer are only *de minimis*, the coerciveness of the accommodation requirement is *de minimis*; and therefore a major Establishment Clause concern disappears.

²² The fact that Title VII contains a "reasonableness" requirement has been emphasized by Courts of Appeals cases upholding the constitutionality of Title VII. *E.g.*, *Nottelmann v. Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 453, 454 (7th Cir. 1981), cert. denied, 454 U.S. 1048 (1981); *Cummins v. Parker Seal Co.*, 516 F.2d 544, 551-54 (6th Cir. 1975), aff'd by an equally divided Court, 429 U.S. 65 (1976), vacated and remanded on other grounds, 433 U.S. 943 (1977). Several lower courts have said that Title VII itself is unconstitutional. See *Innes v. Butler's Shoe Corp.*, 511 F.Supp. 108, 112 (N.D. Ga. 1980); *Gavin v. Peoples National Gas Co.*, 464 F.Supp. 622, 626-33 (W.D. Pa. 1979), vacated on other grounds, 613 F.2d 482 (3rd Cir. 1980); see also *EEOC v. Sambo's of Georgia, Inc.*, 530 F.Supp. 88, 91-92 (N.D. Ga. 1981) (dictum).

explain why people disagree about religious accommodation issues, and may also explain why people often feel some division within themselves. More importantly here, the existence of these multiple perspectives—each understandably making some appeal for recognition—itself reinforces the constitutional case against Connecticut's absolutist law. In insisting on the preeminence of the religious point of view without regard to other factors that exist in particular contexts, Connecticut's statute banishes from consideration all perspectives except one. But an insistence on recognizing multiple perspectives in our society—the religious as well as the non-religious—may be both the deepest meaning of the First Amendment and also the essential predicate for its wise interpretation. That is why this Court has long rejected "absolutist approaches" under the Establishment Clause, and why Connecticut's absolutist law should be rejected now.

(d) *Government Program Cases Such as Sherbert v. Verner Do Not Support the Sabbath Law.*

Petitioner, Intervenor, and the Solicitor General rest much of their legal argument on several of this Court's prior cases considering whether the government may take particular steps to accommodate religious observance. These cases, however, arise in an altogether different context. They involve "accommodation" in the sense of exempting religious people or religious entities from coercive government requirements. Were no exceptions provided in these situations, the government itself would be burdening or penalizing religious activity. These cases therefore involve the fundamental First Amendment principle of avoiding government coercion of religion. In such situations, this Court has recognized that the Establishment Clause often does not forbid government "accommodation" and that the Free Exercise Clause may require it—but only in the sense of an exemption from a government-imposed burden on religious activity. In

Gillette v. United States, 401 U.S. 437 (1971), for example, this Court rejected an Establishment Clause challenge to statutory provisions exempting conscientious objectors from being drafted; such an exemption avoided a clash between government power and religious belief. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court held that the Establishment Clause did not forbid the granting of an exemption from taxation to churches (along with other non-profit entities); such an exemption likewise avoided a clash between government power and religious institutions in an area (taxation) where there had historically been much church/state friction. And in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that the Free Exercise Clause prohibited a state from denying state unemployment benefits to an employee who had resigned from her job because of religious convictions, and that the Establishment Clause permitted such benefits to be granted; the exemption was necessary to avoid a "[g]overnmental imposition of . . . [a] burden upon the free exercise of religion." *Id.* at 404.¹⁷ See also *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Brownfield v. Brown*, 366 U.S. 599, 607 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *United States v. MacIntosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting).

¹⁷ *Sherbert* is repeatedly cited by the other side. Besides resting on a Free Exercise right not involved here, *Sherbert* is different from the present case for other reasons as well. 1) The government was not imposing a duty on any citizen to comply with the religious dictates of another. 2) Providing unemployment benefits to *Sherbert* would not deprive any other person of benefits, and any "cost" would be spread throughout the South Carolina citizenry, not localized on a few identifiable people. 3) The category into which *Sherbert* was placed, people eligible for unemployment benefits because they are deemed available for work, was a broadly "secular" one, not a religious-based category. 4) The *Sherbert* rule does not discriminate among religions. 5) The Court explicitly disclaimed adopting an absolute rule. *Id.* at 404-05. 6) There were apparently no jobs that could accommodate *Sherbert* in the private market. *Id.* at 399 n.2. 7) Substitution was at stake.

The principle of "accommodation" involved in these government program cases—a principle that seeks to avoid a state-created conflict between affirmative government action and an individual's religious liberty—is simply not present in the instant case, which brings into play altogether different First Amendment concerns. In enforcing the Sabbath Law at issue here, Connecticut is coercively burdening private employers to facilitate the religious activity of others. The government is not acting to prevent its own programs from burdening religious activity. Nor is the government protecting anyone's constitutional right to free exercise of religion; the Free Exercise Clause does not grant rights against private parties and is not involved in this case, contrary to Petitioner's suggestion. Pet. Br. 8, 12-14. Thus, in this context, the Establishment Clause is not balanced by a competing constitutional right.¹⁸ The government, in short, is not acting to preserve its own neutrality but is affirmatively compelling one private party to implement the religious preferences of someone else. This explains the flaw in Intervenor's argument that "if it is not an 'establishment of religion' for Connecticut itself to accommodate Sabbath observers as part of its unemploy-

¹⁸ The Free Exercise Clause is a ban on government action interfering with religious freedom. It does not grant rights against private parties, nor does it grant the government authority to advance religious ends. Free exercise "has never meant that a majority could use the machinery of the State to practice its beliefs." *Akivoski v. Board of Educ. v. Schenck*, 374 U.S. 205, 226 (1963). The government, of course, may take certain steps to remove private obstacles to religious exercise, but there is a difference between protecting religious liberty by prohibiting acts of religious bigotry that serve no legitimate purpose and forcing people to sacrifice important secular interests to promote other peoples' religious observances. The Establishment Clause is an independent constraint on what the government may do to facilitate and promote religious observance. See *Nippert*, 413 U.S. at 788-89 (affirmatively promoting free exercise is "advancing religion" and does not "justify an eroding of the limitations of the Establishment Clause").

ment compensation program, then it cannot be an 'establishment of religion' for the state to require private employers to make the same accommodation." Int. Br. 20 (emphasis in original). What raises distinctive Establishment Clause problems in the latter situation is the presence of direct coercion of private parties²⁰ to subordinate their own legitimate secular interests to the religious beliefs of others—and the absence of a competing constitutional policy of avoiding government coercion of religious activity.

Finally, even in the government program cases, the accommodation requirement of the Free Exercise Clause is not absolute. The "free exercise" value can be outweighed by competing secular values. "[T]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982). See *Wisconsin v. Yoder*, 406 U.S. at 215; *Gullette v. United States*, 401 U.S. at 461-62; *Sherbert v. Verner*, 374 U.S. at 406-409; *Brazaford v. Brown*, 366 U.S. at 603-604; *United States v. MacLachlan*, 283 U.S. at 624. Certainly when the government seeks to compel private employers to accommodate the religious beliefs of others—and there is no constitutional right to free exercise involved at all—the government may not proceed in a more absolutist fashion.

2. The Sabbath Law Impermissibly Favors Religion Over Non-Religion and Favors Certain Traditional Religions Over Others.

There is a second major way in which the Sabbath Law offends Establishment Clause values: it favors reli-

²⁰ The coercive burdens in this context have distinctive features: they are direct, are suffered by identified people, entangle private parties in the conflicts of implementing the state's religious policies, and include the "message" that the government values religious interests above other interests.

gion over non-religion and favors certain traditional religions over others. The preceding subsection of the statute, section 53-303e(a), guarantees that no employee may be required to work more than six days a week—a right extended to all employees. But the Sabbath Law, section 53-303e(b), extends to only some employees a further valuable benefit, a right to designate a particular day of the week as a weekly day off—as a practical matter, a right not to work on a weekend day. The only employees given this absolute right are those whose religious tenets include a workfree Sabbath.

Aware of the constitutional difficulties that such favoritism creates, Thornton urged the Connecticut Supreme Court to "construe the term 'Sabbath' as utilized in subsection (b) as simply a 'time of rest,' without any religious overtones." Pet. App. 12a. This broader construction would have meant that any employee, religious or non-religious, could designate a particular day off.²¹ However, following the Connecticut legislature's requirement that words in statutes be given their "commonly accepted meaning," Conn. Gen. Stat. § 1-1; see Pet. App. 11a, the Connecticut Supreme Court found such a broad reading of the state statute unpersuasive as a matter of state law. It concluded that the right to designate a particular day off is extended on a religious basis, only to those employees whose "'rest' is specifically mandated by the tenets of a particular religion," those for whom "that particular day is deemed holy under the beliefs of various religious sects." Pet. App. 12a-13a. This Court, of course, must take the Connecticut court's construction of state law as definitive. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874).

²¹ Petitioner's present attempt in this Court to characterize the statute as a considered effort to protect religious liberty is, of course, inconsistent with its position in the Connecticut Supreme Court.

A statute so construed, however, cannot stand: it lacks the government "neutrality" that countless Establishment Clause decisions of this Court have commanded. See, e.g., *Mueller v. Allen*, 103 S.Ct. 3062, 3069 (1983); *Gillette*, 401 U.S. at 454; *Walz*, 397 U.S. at 668, 669. This required neutrality is really just one aspect of our Constitution's broad commitment to the proposition that the "sovereign . . . must govern impartially." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Neutrality does not mean "hostility," *Lynch*, 104 S.Ct. at 1358, 1361-62, or a "crabbed" view toward religion, *id.* at 1366. The required neutrality is a "benevolent neutrality," *Walz*, 397 U.S. at 669, involving a sensitivity to religion and sympathetic acknowledgement of it. But under the Establishment Clause this sympathy may never be a selective sympathy; the government's sympathy may never extend distinctively and especially towards traditional religious activity. If it does, benign neutrality has been lost and the government enters the forbidden realm of religious favoritism, discrimination, endorsement, and establishment.

The Connecticut statute violates the principle of neutrality in two main ways. First, it impermissibly favors religion over non-religion. See *Mueller*, 103 S.Ct. at 3067-68; *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Meek v. Pittenger*, 421 U.S. 349, 362 (1974); *Nyquist*, 413 U.S. at 781-83 and n.38; *id.* at 799-802 (Burger, C.J., concurring); *Walz*, 397 U.S. at 669; *id.* at 695 (Harlan, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Most obviously, religion is favored because only employees espousing particular religious views are given a right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other em-

ployees who have strong but non-religious reasons for wanting a weekend day off—for example, those employees who would like Saturdays off to watch their children play in a weekly Little League game held only on Saturdays, or who want Sundays off because that is the only day their spouse is also off—have no rights under the Connecticut statute. To justify this favoritism on the ground that the activities of non-religious workers are simply less important than Sabbath observance is precisely a ranking of religion ahead of non-religion that the Establishment Clause forbids the government from making. Moreover, non-religious workers are disadvantaged in another respect: they are not only denied a benefit that Sabbath observers have, but they must take up the slack when religious workers take advantage of their benefit. The employer, in turn, is required to manage the resulting unhappiness and resentfulness. Petitioner asserts that neutrality requirements are not violated when "non-observant employees may be inconvenienced by being assigned to work on a weekend day in order to accommodate a fellow employee's statutory rights of Sabbath observance." Pet. Br. 33-34. But *Hardin* explicitly states that such a system would not be "neutral" but would involve "unequal treatment of employees on the basis of their religion." 432 U.S. at 80, 81, 85.²⁷

The Establishment Clause does not, of course, condemn all government programs that extend "benefits" to religion; but to satisfy the requirement of government neutrality between religion and non-religion, religion must be part of a broader category receiving the government's aid. Thus, in upholding a tax exemption afforded to

²⁷ "Neutral system(s)" of alleviating the burdens of weekend work, the Court said, include "seniority, a lottery, or rotating shifts"; "allow[ing] days off in accordance with the religious needs of . . . employees" was "unjust treatment." *Hardin*, 432 U.S. at 81-82.

churches, this Court in *Waltz* emphasized that the exemption extended not only to religious institutions, but to all institutions devoted to educational and/or charitable purposes. 397 U.S. at 672-73; *id.* at 689 (Brennan, J., concurring); *id.* at 694, 697-98 n.1 (Harlan, J., concurring). Similarly, this Court has upheld textbook loans to sectarian schools, *e.g.*, *Everson*, 330 U.S. at 16; *Board of Ed. v. Allis*, 392 U.S. 236 (1968), and tax deductions for expenses incurred by parents in sending their children to parochial schools, *e.g.*, *Moslier*, 103 S.Ct. at 1368, only where religion is benefitted as part of a broader class that receives the benefits of the government program. At the very least, the broader class must be defined in terms of conscientious belief rather than traditional religion. *Gillette*, 491 U.S. at 447, 450-51; see 29 C.F.R. § 1605.1 (EEOC Guidelines under Title VII requiring accommodation to conscientious belief as well as conventional religion).¹⁰ By contrast, in granting the right to designate a weekly day off to traditional Sabbath observers alone the Connecticut statute fails to meet the requirements of Establishment Clause neutrality between religion and non-religion.

The Connecticut law violates the neutrality principle in a second respect. By giving only people who observe a workfree Sabbath the right to designate their day off,

¹⁰ Petitioner argues that "The First Amendment renders it permissible for government to accommodate individual religious claims while declining to make adjustments for analogous strongly held secular beliefs." Pet. Br. 33. As indicated by the case that Petitioner cites, however, this is true only where Free Exercise Clause rights are involved; since the Free Exercise Clause only protects religious rights, the Government obviously may (indeed sometimes must) treat such rights differently from other interests. There is no Free Exercise Clause right involved in Thornton's case. See *supra* p. 27.

the state favors certain traditional religions over other traditional religions, and favors certain traditional observances over others. See *Larson v. Valente*, 436 U.S. 229 (1972); *Torcaso v. Watkins*, 367 U.S. 488 (1961). The Sabbath observance which the Connecticut law benefits is a central practice within only three major religions: Judaism, Christianity, and Islam. See *Encyclopedia of Religion and Ethics* 885 (1928); 4 *The Interpreter's Dictionary of the Bible* 125 (1962); *Webster's Third New International Dictionary* 1194. Petitioner is simply wrong when it asserts that Connecticut's statute "protects all religious groups equally, and does not favor any one religion." Pet. Br. 24. Inevitably—and not without reason—members of religions without a workfree Sabbath will conclude that Sabbath religions have received the state's imprimatur and endorsement. See *Gillette*, 491 U.S. at 450; *Lynch*, 104 S.Ct. at 1368 (O'Connor, J., concurring).¹¹

These preferences for religion also fail to meet Establishment Clause requirements when measured by the *Lemon* "purpose" and "effects" tests; *Lemon*, in other words, ferrets out a violation of the Establishment Clause's neutrality value. As the Connecticut Supreme Court determined, the absence of a "clearly secular purpose" and the presence of an impermissible effect are indicated by the fact that the statute singles out and rewards those for whom a Sabbath day is "deemed holy under the beliefs of various [traditional] religious sects." Pet. App. 13a. In explicitly making the absolute right to designate a day off contingent on being religious—a right "with religious strings attached," as the Connecti-

¹¹ Once again Title VII of the Civil Rights Act avoids the relevant constitutional pitfalls of the Connecticut statute. The duty to accommodate under Title VII extends to all "religious observance or practice," not simply to Sabbath observance. 42 U.S.C. § 2000e(j). The EEOC has construed "religion" in Title VII to include not simply conventional religion but also less conventional forms of conscientious belief as well. 29 C.F.R. § 1605.1.

ent Supreme Court said—the Connecticut legislature acted with a religious purpose and impermissibly advanced religion.²¹ It is particularly significant that Connecticut's own Supreme Court has made the judgment that its state statute did not reflect a secular purpose. That judgment reflects a distinctive knowledge of the Connecticut legislature and how that body has previously treated legislation with religious overtones,²² and therefore this Court should not disturb the state court's determination.²³

This analysis makes clear why the cases upholding Sunday closing laws—upon which Petitioner places such great reliance—actually hurt rather than help Petitioner's

²¹ Petitioner and the Solicitor General suggest that the Loewen test's purpose prong impermissibly condemns all legislation that might be characterized as facilitating religious liberty. Pet. Br. 33-35; SG Br. 27. This is the equivalent of saying that a law prohibiting race-based discrimination is an illegal racial classification. Working with any legal test or legal category requires the exercise of judgment in deciding how to characterize particular actions and deciding where to draw lines. See supra note 24.

Petitioner also suggests that the effect of this statute is not to advance religion since “whatever benefit eventually does come to religion from accommodating Sabbath observance does so only as a result of the private decisions of individual employees.” Pet. Br. 32. This is obviously false. It is only because of the compulsion of state law that employers will defer to those private decisions.

²² See, e.g., Griswold v. State, 188 Conn. 512, 462 A.2d 98 (1983) (holding an impermissible religious purpose to statute which singled out Good Friday as the only day of the year on which liquor could not be sold); O’Malley v. Building Servs. Int’l, 377 Conn. 294, 417 A.2d 543 (1979) (striking down Connecticut’s Sunday closing law as “arbitrary, discriminatory, and unconstitutional”); Griswold v. Connecticut, 380 U.S. 679 (1965) (striking down Connecticut law which banned the use of contraceptives).

²³ See, e.g., Ward v. Illinois, 409 U.S. 776, 773 (1972); O’Brien v. Illinois, 404 U.S. 364, 363 (1971). See also Minnesota v. Church Leaf Crossing Co., 449 U.S. 408, 473-48 and nn.2, 3 (1980) (Stevens, J., dissenting).

cause. The Sunday closing laws upheld by this Court in *McGowen* and other cases were deemed appropriately neutral to satisfy the Establishment Clause because they furthered a secular purpose of securing a common day of rest.²⁴ The statutes made no distinction between religious and non-religious people; the statutes applied to both and favored neither. Indeed, the Court specifically recognized that “people of all religions and people with no religion regard Sunday as a time for family activity, or visiting friends and relatives . . . and the like,” and that it would violate the Establishment Clause “to use the state’s coercive power to aid religion” alone. *Id.* at 452, 453. As the unanimous Connecticut Supreme Court recognized in the present case, in place of a common day of rest Connecticut has given religious employees alone an individual right to designate a day off; in lieu of a neutral Sunday closing law, Connecticut has substituted a non-neutral and explicitly religious-based rule.²⁵

²⁴ The Supreme Court in *McGowen* also noted that Sunday Closing Laws had existed in many states at the time the First Amendment was adopted and therefore presumably were not intended to be outlawed by the Amendment. 366 U.S. at 437-48. No such historic tradition attaches to Connecticut’s statute giving certain employees a right to designate a Sabbath day off.

²⁵ Intervenor also sees support for its view in *Brownfield v. Brown*, 366 U.S. 599 (1961), a Sunday closing law case which was decided the same day as *McGowen* and which held that the Free Exercise Clause did not require Sunday closing laws to make an exception for store owners who observed a Saturday Sabbath. Intervenor does not linger with *Brownfield*’s holding since it actually rejects an accommodation requirement. Rather, Intervenor sees authority for its position in some dicta in the Court’s opinion to the effect that such a Sabbath exception, while not constitutionally required, “may well be the wiser solution.” 366 U.S. at 608. If “wiser,” Petitioner says, then surely constitutional; and if a Sabbath exception is constitutional in that context, then Connecticut’s Sabbath statute must be constitutional as well.

The argument cannot withstand scrutiny. *Brownfield*’s “wiser solution,” assuming it is constitutional, simply exempts religious store keepers from a burdensome government requirement. As

3. The Sabbath Law Impermissibly Involves the Government in Excessive Investigation and Monitoring of Religious Observance.

The Sabbath Law offends the basic purposes of the Establishment Clause in a third way: it entangles the Government in excessive investigation and monitoring of religious observance. Indeed, the law enlists and enmeshes private employers in the thoroughly distasteful process of implementing the state's religious-based entitlement. The third criterion of the *Lemon* test explicitly invokes these Establishment Clause concerns by requiring that government action "avoid excessive entanglement with religion." 403 U.S. at 613-14, 622.

The Connecticut Supreme Court, construing its own state's statute, has spoken clearly about the kind and degree of interaction that is contemplated during enforcement proceedings under the Sabbath Law:

Subsection (c) of § 53-303e(b) empowers the state board of mediation and arbitration to resolve disputes arising under subsection (b). Inevitably, as employers challenge the sincerity of employees' Sabbath observance, the board's inquiry will encompass an analysis of the particular religious practices and will require a decision concerning the scope of religious activities which may fairly be labelled "observance of Sabbath."

Pet. App. 15a-16a. The enforcement scheme, the court said, anticipates "inspection and evaluation of the reli-

related earlier, see *supra* pp. 25-28, government accommodations of this sort involve the First Amendment policy of avoiding governmental burdening of religious activity. This First Amendment policy is not at all involved in Connecticut's Sabbath Law, which imposes a burden on private employers and therefore implicates an altogether different First Amendment value, the principle that government should not coerce some people to support the religious practices of others. Moreover, nothing in Brownfield's dicta suggests that absolutist Sabbath exceptions in the private employment context are constitutional—or for that matter "wise."

gious content of a religious organization" and involves "comprehensive, discriminating and continuing state surveillance" of religion. *Id.* at 16a (quoting *Lemon*). This is a construction of state law, a definitive interpretation of what kind of enforcement proceeding this Connecticut statute contemplates, and it is not open to reinterpretation in this Court.

The Connecticut Supreme Court concluded that the Sabbath Law requires the Arbitration Board to examine not only the sincerity with which employees hold their beliefs in Sabbath observance, *cf. Gillette*, 401 U.S. at 440, 448, but also what activities their religions deem to be "observance of Sabbath" and whether they in fact engaged in religious activities of sufficient "scope" to qualify for a Sabbath day off. This is obviously a distinctively intrusive enforcement regime.⁶⁰ The fact that Petitioner can point to other "accommodation" statutes from other jurisdictions which involve less comprehensive and less intrusive processes, Pet. Br. 36-37, is obviously irrelevant to the entanglement question here since those statutes are not involved in this case.

Moreover, the Connecticut Supreme Court's understanding of the Sabbath Law's enforcement dangers reflected more than the Connecticut legislature's written words. It was supported by the proceeding before the State Arbitration Board in this case. See J.A. 1a-87a. In contrast to Title VII, the Sabbath Law provides for no conciliation process that might minimize entanglements, but provides only for a formal proceeding before the Board. Two matters from the record in this formal proceeding indicate the dangers. When Thornton was

⁶⁰ Such an inquiry may well include questions about the proper way to observe the Sabbath, often a subject of division within a religion as well as among religions. See e.g., A. Millgram, *Sabbath* 172-74, 371 (1944); *Symposium*, 31 *Judaism* 1 (Winter 1982) (a symposium on the Sabbath). See E. Dickinson, *The Complete Poems of Emily Dickinson*, #324 (T. Johnson ed. 1960) ("Some keep the Sabbath going to Church").

examined to determine the nature of his activities of observance, his lawyer objected to the line of inquiry; the Board overruled the objection, thereby indicating the legal relevance of the inquiry. J.A. 76a-78a. Second, in its written decision the Board stated: "[Mr. Thornton] testified to some extent as to what he would do and would not do as an observance of his Sabbath. The panel felt that Mr. Thornton had justified to the panel, that, in fact, his Sundays were his day of Sabbath." J.A. 10a. The record makes it clear that the Board viewed Thornton as a supplicant who had to justify the nature of his observance. The Board entrusted with making these legally relevant judgments about religion in Connecticut is a state agency with no distinctive expertise concerning such sensitive issues. The Connecticut Supreme Court's conclusion that the Sabbath Law "creates excessive entanglements," Pet. App. 16a, is clearly correct.²²

B. Establishment Clause Objections to The Sabbath Law Are Not Answered By Efforts To Characterize The Statute As An "Antidiscrimination Law."

Petitioner, Intervenor, and some amici seek to deflect the force of the preceding arguments by characterizing the Sabbath Law as an "antidiscrimination law," thereby trying to invest it with the moral authority that antidiscrimination laws have in our society. This characterization is altogether misleading. Connecticut's Sabbath Law was not adopted as part of the state's anti-discrimination statutes—it was passed as part of a Sunday closing law—and it has none of the earmarks of an

²² The Solicitor General suggests that the entanglement branch of the Lemon test concerns only interactions between the government and religious institutions, and does not include intrusive entanglements between the government and religious individuals. SG Br. 28. The purpose of the entanglement doctrine, the history of religious oppression, the cases (e.g., *Lemon*, 411 U.S. at 622; *Thomas*, 439 U.S. at 714-15), and our country's fundamental concern for the individual, all suggest that such a limitation would be totally unjustified.

antidiscrimination statute. The Sabbath Law, in fact, is a mandatory preferential treatment statute—just the sort of law that is disfavored by both antidiscrimination principles and Establishment Clause values. Merely affixing to it the "antidiscrimination" label remedies none of its Establishment Clause failings.

Those supporting the petition seek to equate the Connecticut statute with the classic sort of antidiscrimination law that prohibits discrimination in employment because of race, sex or religion. Such statutes proscribe so-called "disparate treatment," such as an employer's refusal to hire someone because of bigotry or prejudice against the person's religion; they prevent employers from disadvantaging people based on a characteristic that is irrelevant to job performance. Connecticut has such an antidiscrimination law, Conn. Gen. Stat. §§ 46a-51 et seq., and Title VII is such a law. But the Sabbath Law proscribes very different conduct. Contrary to the unsubstantiated suggestions of Petitioner and Intervenor, Pet. Br. 9, 11, 24; Int. Br. 8, 20, 25, Calder did not reject Thornton's demands "because of" religion or any other characteristic irrelevant to job performance; Calder acted because Thornton would not follow a job-related work schedule that applied to all managers neutrally, without regard to their religion.

Nor can the Sabbath Law be equated with another principle that appears in antidiscrimination law, the "disparate impact" principle associated with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under *Griggs*, Title VII prohibits the use of certain "facially neutral" employment practices that have a "disparate impact" on blacks unless those practices are shown to be "job-related" or to "fulfill a genuine business need." *Id.* at 432. *Griggs*, therefore, contemplates a balancing approach, not a *per se* rule. The Sabbath Law, by contrast, is an ab-

absolute prohibition on the use of job-related work schedules whenever a Sabbath observer would prefer otherwise.

In fact, the Sabbath Law has all the earmarks of a practice that is disfavored in antidiscrimination law: unfair preferential treatment. Connecticut gives Sabbath observers, but only Sabbath observers, an absolute right to designate a day off. Far from eliminating religion from an employer's consideration, it introduces religion into the workplace and requires the employer to administer religious tests. Cf. *Torcaso v. Watkins*, 367 U.S. 488 (1961). The analogue to the Sabbath Law in antidiscrimination law is not a statute which prohibits discrimination against certain groups but a statute which mandates their preferential treatment. Such preferences have been upheld only in very limited circumstances, e.g., to eliminate the effects of past discrimination, see *Steelworkers v. Weber*, 443 U.S. 193, 201-204 (1979), but in other contexts, preferential treatment is simply a new act of "discrimination," not "antidiscrimination." See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Truan v. Reirk*, 239 U.S. 33 (1915). The decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), establishes that "discriminatory unequal treatment" is the right characterization of the Sabbath Law. In *Hardison*, this Court construed Title VII's religious accommodation provision narrowly, precisely because the Court concluded that a broader requirement would involve "unfair treatment of employees" and "discriminate against some employees." *Id.* at 81-82 (emphasis added). To call a mandatory preference statute an "antidiscrimination" statute or an "equal opportunity" statute is only a play on words. Simply to say that a statute promotes "equal" treatment does not make it so. Cf. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

The critical point for present purposes, however, is that Petitioner's argument about discrimination and antidiscrimination does not cure the Establishment Clause

problems of the Sabbath Law. The Establishment Clause operates as a constraint on all legislation, however it is labelled. The classic form of antidiscrimination statute that prohibits employment discrimination based on a person's race, sex, and religion is obviously constitutional; it expresses the state's neutral and secular concern that prejudices irrelevant to job performance (including religion) should not stand in the way of employment. *Railway Mail Ass'n v. Corr*, 325 U.S. 88, 98 (1945) (Frankfurter, J., concurring). But when the state goes as far beyond this kind of statute as Connecticut has gone—intruding on legitimate secular interests by giving Sabbath observers alone an absolute right to designate their weekly day off—all the Establishment Clause objections mentioned above come to the forefront.

C. This Court's *Lemon v. Kurtzman* Criteria Should Not Be Replaced By Petitioner's Proposed New Establishment Clause Test.

The preceding analysis has shown that application of the *Lemon v. Kurtzman* test in this case precludes basic values embodied in the Establishment Clause. The Sabbath Law does not further a clearly "secular purpose," as required by *Lemon*'s first prong, because Connecticut has acted inconsistently with two important Establishment Clause values. In violation of the neutrality value, Connecticut has granted a right to designate a particular day off only to those employees for whom that day is "deemed holy under the beliefs of various traditional sects." Pet. App. 13a; see *opposite* pp. 23-24. And in violation of the non-coercion value, Connecticut has imposed an absolute requirement that private employers defer to Sabbath observers even if such deference requires the subordination of all competing secular values of the employer and his other employees. See *opposite* pp. 23-25. For similar reasons, the Sabbath Law violates the second prong of *Lemon*'s test, which requires that laws have "a primary effect that neither advances nor inhibits reli-

gion." See *supra* pp. 23, 23-34. Finally, the Sabbath Law fails to meet the third prong of Lemon's test, the prohibition on excessive entanglements, which itself is a basic Establishment Clause value. See *supra* pp. 34-38.

Petitioner and the Solicitor General have urged this Court to abandon the Lemon test. While no "test" can replace the measure provided by the basic purposes of the Establishment Clause, the Lemon v. Kurtzman criteria have proved, over a considerable period of time, to be a useful and flexible judicial standard in crystallizing the major issues at stake in an Establishment Clause case.²² Petitioner's proposed alternative test is a rational relation standard to be used whenever the government action is characterized as "protecting religious freedom." Pet. Br. 9, 19; cf. SG Br. 27. This test is simply plucked out of thin air, and it ignores basic Establishment Clause values as well as the historic reasons for a stricter constitutional test. If accepted, Petitioner's test would radically disestablish the Establishment Clause. A broad range of government actions that would clearly violate the Establishment Clause—for example, a statute funding only religious private schools—may well promote the "liberty" of religious groups and make it easier for observers to practice their faith. The Establishment Clause, however, is an independent constraint on what and how the government may facilitate and accommodate religious activity.

²² Although the Court did not utilize the Lemon test in two recent cases, both involved special circumstances not relevant here. *Mosk v. Chambers*, 348 U.S. 3350 (1963), the case upholding the use of legislative chaplains, involved a practice that was apparently accepted as part of the specific original understanding of the First Amendment; the "unique history" made irrelevant any doctrinal "test." *Id.* at 3355. In *Lemon v. Valente*, 404 U.S. 238 (1962), a case involving denominational preference, the Court also bypassed the Lemon test—this time in favor of an apparently more demanding "strict scrutiny test"—but the Court emphasized Lemon's general applicability. *Id.* at 242.

The main reason that those supporting the petition retreat from the Lemon test is that they know they cannot meet it. And their attack on Lemon is not so much an attack on the test as it is a rejection of the values embedded in the Establishment Clause itself.

II. TITLE VII OF THE 1964 CIVIL RIGHTS ACT, WHICH PROHIBITS DISCRIMINATION BASED ON RELIGION, BARS CONNECTICUT FROM REQUI- RING AN EMPLOYER TO GIVE PREFERENTIAL TREATMENT TO RELIGIOUS EMPLOYEES.

This Court need not reach the constitutional question in this case because the Connecticut Sabbath Law is also inconsistent with Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq.²³ Title VII expressly preempts those state laws which require acts that are illegal under Title VII. Section 708 of the Act, captioned "Effect On State Laws," provides that:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, pen-

²³ It is the settled practice of this Court to avoid the decision of a constitutional issue if a case can fairly be decided on a statutory ground. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 282, 346-48 (1936) (Brandeis, J., concurring); *Specter Motor Co. v. McLoughlin*, 323 U.S. 181, 186 (1944). Moreover, "it is . . . the general rule that a cross-appeal or cross-petition is not necessary to enable a party to advance any ground, even one rejected or not considered below, in support of the judgment in his favor." R. Stern & E. Greenman, *Supreme Court Practice* 678-79 (1978); see *Dugay Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (respondent "settled under our precedents to urge any grounds which would lend support to the judgment below"); see also *Shadron-Tenges v. University Foundation*, 400 U.S. 318, 320 n.4 (1971); *Langford v. Green*, 392 U.S. 521, 529 (1968). Although the Title VII ground involved here was not addressed by the tribunal below, at every stage of this litigation Respondent Counsel has raised the argument that the Connecticut Sabbath Law goes beyond the requirements of Title VII. It is particularly appropriate for this Court to exercise its power to address the Title VII ground available to support the Connecticut Supreme Court's judgment, even though that ground was not addressed below, since it permits the Court to avoid resolution of a federal constitutional question.

alty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this sub-chapter.

42 U.S.C. § 2000e-7 (emphasis added). Calder cannot be made liable to Thornton under the Sabbath Law since the Connecticut statute "require[s] . . . the doing of [an] act which would be an unlawful employment practice under [Title VII]" and is therefore preempted by Title VII.

Title VII provides, *inter alia*, that it is an unlawful employment practice for an employer to discriminate against any individual "because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1). The Sabbath Law is inconsistent with Title VII since its provisions constitute discrimination based on religion, and Calder's compliance with those provisions would constitute discrimination based on religion. This conclusion is inescapable after *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). As noted earlier, *Hardison* concluded that Title VII did not require an employer to bear more than *de minimis* costs to accommodate an employee's Sabbath observance. While *Hardison* directly involved what an employer was and was not obliged to do to specially accommodate religious employees, the majority's reasoning makes clear that the Court was also addressing what an employer was and was not permitted to do. The *de minimis* requirement also marks the boundary under § 701 of what a state may require an employer to do.

Hardison begins by emphasizing that Title VII's ban on discrimination because of religion must be read symmetrically, as prohibiting both the advantaging of per-

ple because of their religion as well as the disadvantaging of them:

The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 278, 289.

432 U.S. at 71-72. The reliance on *McDonald* is significant since that case held that Title VII's ban on racial discrimination extended to discrimination in favor of blacks as well as discrimination against them.²⁷ Thus, Title VII generally prohibits employers from hiring only Catholics or religious people, just as it prohibits employers from refusing to hire Catholics or religious people.²⁸

There is, however, a limited qualification to this basic Title VII prohibition on the favoring of religious workers: some favoring of them is allowed to the extent required by Title VII's "reasonable accommodation" provision as construed in *Hardison*. Title VII, in other

²⁷ In a narrow category of situations, of course, the courts have upheld racial preferences as part of affirmative action plans to overcome the effects of past racial discrimination. See *Shawcross v. Weber*, 443 U.S. 193 (1979) (Title VII); see also *University of California Regents v. Bakke*, 438 U.S. 299 (1978) (Title VI).

²⁸ Cf. 118 Cong. Rec. 2607 (1964) (remarks of Rep. Cellar stating that discrimination in favor of religious people and against atheists is prohibited); *Young v. Southeastern Sec. & Loan Ass'n*, 509 F.2d 143, 143-45 (5th Cir. 1975). This position regarding Title VII is further supported by the presence of § 702 and § 703(e)(2) of the Act, which explicitly permit religious institutions to engage in disparate treatment in favor of persons belonging to a particular religion. These provisions indicate that such preferential treatment would otherwise be an unlawful employment practice in violation of the Act. 42 U.S.C. §§ 2000e-1, 2000e-2(a).

words, itself embodies the tension between religious exercise values and Establishment Clause values, and it puts the line at "reasonable accommodation." Whether or not that is the line mandated by the Constitution, it is now mandated by federal statute.

Under this Title VII plan, any religious-based accommodation that goes beyond what the reasonable accommodation provision mandates—such as Connecticut's Sabbath Law—constitutes impermissible "discrimination in employment." This is the basis for *Herdon*'s holding that no more than *de minimis* costs must be born for accommodation: anything more would constitute unequal treatment and discrimination in employment. Allowing the burdens of Saturday work involves the interests of not only religious workers but also "others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Id.* at 81. In analyzing the accommodation that Title VII requires, the Court is also clearly addressing the accommodation that is prohibited. To give religious workers Saturdays off:

TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.

Id. at 82 (emphasis added). Even when speaking about what religious-based accommodations Title VII does not require, *Herdon* indicates that an employer who does more—or a state that requires employers to do more—is engaged in unlawful employment discrimination:

(T)he require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treat-

ment of employees on the basis of their religion (T)he privilege of having Saturdays off would be alleviated according to religious beliefs (W)e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Id. at 84-85 (emphasis added).

Because Connecticut alleviates "the privilege of having Saturdays off . . . according to religious beliefs," *id.*, and goes far beyond Title VII's reasonable accommodation standard, Connecticut's requirements entail discrimination based on religion under Title VII. Connecticut's Sabbath Law is therefore inconsistent with and preempted by the federal statute as well as the First Amendment.

III. IN LIGHT OF RECENT LEGISLATION ADOPTED IN CONNECTICUT, THE WRIT OF CERTIORARI SHOULD BE DENIED AS IMPROVIDENTLY GRANTED.

On April 26, 1984, after this Court granted the writ of certiorari in this case but before any briefs on the merits were filed, the Connecticut legislature adopted a new statute which, like Title VII, establishes a flexible requirement that employers make reasonable accommodation to the religious practices of their employees (short of undue hardship).¹⁰ Precisely tracking the language of Title VII, the new statute amends Connecticut's general antidiscrimination statutes and reads as follows:

"Discrimination on the basis of religious creed" includes but is not limited to discrimination related to all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

¹⁰ The Governor of Connecticut signed the bill on May 25, 1984.

Conn. Gen. Stat. § 51a-51 (19). In light of Connecticut's adoption of this new statute, the writ in the present case should now be dismissed as improvidently granted. As the case is now posture, there is no substantial federal interest warranting review by this Court.

In contrast to the Sabbath Law, this new Connecticut statute is not an absolutist statute but includes a "reasonable accommodation"/"undue hardship" provision. Moreover, in protecting the general category of "religious observance and practice" it avoids the favoritism entailed in singling out only Sabbath observance for special protection. The new statute thus avoids features which make the Sabbath Law virtually unique among state and federal laws and distinctively problematic under the Establishment Clause. While the new statute does not explicitly repeal the Sabbath Law and does not affect Thornton's own cause of action in this case,⁴⁹ the legislative history indicates that the new statute was adopted with an explicit awareness of the Connecticut Supreme Court's decision in this case and with the recognition that this new statute might be a more acceptable way to deal with analogous employment issues. See Hearings Before the Committee on Judiciary of the House of Representatives of the State of Connecticut 59-62 (March 2, 1994).

This Court has frequently dismissed a writ of certiorari when new statutory developments change the posture of the case. See, e.g., Triangle Improvement Council v. Babbitt, 492 U.S. 497, 498-99 (1991) (Marshall, J., concurring); *Rico v. Sioux City Country*, 349 U.S. 78 (1953); cf. *Fawcett v. Steinberg*, 429 U.S. 879 (1976);

⁴⁹ The new statute, the effective date of which is October 1, 1994, would obviously not apply to Callier's actions in 1973 and 1980 that are the basis for this suit by Thornton's estate. Thus, a return to the Connecticut courts to determine Callier's possible liability under this new statute would be clearly inappropriate. The new statute explicitly contains provisions of a completely different title of the Connecticut statutes.

id. at 390-91 (Burger, C.J., concurring). See also Blumstein, *The Supreme Court's Jurisdiction-Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 Vand. L.R. 895, 931 (1973). See generally R. Stern & E. Grossman, *Supreme Court Practice* 372-73 (5th ed. 1978). Here, Connecticut's adoption of its new statute significantly reduces the "importance" of this case. Sup. Ct. R. 17. Connecticut's Sabbath Law is unique and aberrational and has now effectively been supplanted by the state itself, acting through combined actions of its legislative and judicial branches. The importance of this case to Connecticut citizens has therefore been reduced. Were this Court to dismiss the writ as improvidently granted, the unanimous decision of the Connecticut Supreme Court invalidating its own state's absolutist law would of course remain standing, but Connecticut's citizens would be protected by a strong but flexible religious accommodation law.⁵⁰

Moreover, the orderly development of the constitutional law of religious accommodation hardly requires that this Court reach out and decide the controversial question raised by the Sabbath Law. The truly important unanswered question in the law of religious accommodation concerns the constitutionality of "reasonable accommodation" statutes like Title VII and the laws of a large number of states (now including Connecticut). See SG Br. in Support of Petition 2, 13-15. The absolutist and aberrational Sabbath Law raises very different questions of very limited national importance. Indeed, since extreme cases usually provide a poor vantage point for considering basic constitutional issues, dismissal would avoid the danger that review of an aberrational statute such as

⁵⁰ Presence of the new statute also fully protects an important public interest identified by the Solicitor General—the interest in supporting state laws and procedures that "prohibit conduct that may also be unlawful under Title VII" and that will therefore parallel federal enforcement of Title VII's "reasonable accommodation" provision. SG Br. 3-8.

Connecticut's Sabbath Law would actually distort the evolution of religious accommodation doctrine.

In addition, dismissal of the writ would not produce individual unfairness. While dismissal would leave the judgment against Thornton undisturbed, his is the only case under the Sabbath Law to have reached the Connecticut courts.⁴⁴ Thornton himself is now deceased.

In short, a decision on the merits of this controversial case will be an unnecessary decision involving a unique and aberrational statute that even the State of Connecticut has recognized it can live without. The writ of certiorari should be dismissed as improvidently granted.

CONCLUSION

The judgment of the Connecticut Supreme Court should be affirmed, or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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⁴⁴ Several other proceedings did not go beyond the state Board.

⁴⁵ Counsel for the Respondent gratefully acknowledge the assistance of David R. Dow, a third-year student at the Yale Law School, who aided in the preparation of this brief.

APPENDIX

APPENDIX

STATE STATUTES

What follows is a brief summary of each state law that either Petitioner, Intervenor or the Solicitor General cites as analogous to Connecticut's Sabbath Law. See page note 10.

* * * *

1. Alaska Stat. §§ 18.80.200, 18.80.220(a)(1) (1982). Requires reasonable accommodation short of undue hardship. *Woodwell v. Alaska Wood Products, Inc.*, 582 P.2d 669 (Alaska 1979), *rev'd on other grounds*, 443 P.2d 584 (1979), *appeal denied*, 444 U.S. 1040 (1980).
2. Arizona Rev. Stat. Ann. § 43-1401(e) (1982). Requires reasonable accommodation short of undue hardship.
3. California Const. art. I § 8. As interpreted by the California Supreme Court, the California Constitution requires reasonable accommodation short of undue hardship. *See Readline v. Commission on Professional Competence*, 134 Cal. Rptr. 997, 24 Cal. 3d 187, 593 P.2d 812 (1979), *appeal denied*, 444 U.S. 996 (1979).
4. Colorado [State Laws] Fair Emp. Prac. (BNA), p. 453:1141 Rule 50.2 (Sept. 25, 1980). Requires reasonable accommodation to religious needs short of undue hardship.
5. District of Columbia. [State Laws] Fair Emp. Prac. (BNA), p. 453:1708 (June 11, 1979). Section 17-E adopts EEOC guidelines on Title VII, see 29 C.F.R. § 1605.1, requiring reasonable accommodation short of undue hardship.
6. Georgia Code Ann. §§ 20-1-870, 20-1-871, 43-19-22 (2) (1982). Requires employers who are open on Saturdays or Sundays to reasonably accommodate to the "religious, social, and physical needs" of their employees, short of undue hardship. See § 4-19-22(2).

7. Illinois. [State Laws] Fair Empl. Prac. (BNA), p. 453-2756 (Dec. 12, 1978). Section 5.2 requires reasonable accommodation to religious practice; § 5.3 requires reasonable accommodation to Sabbath observers.

8. Iowa Code Ann. § 601A.6(1)(a) (West 1975). A basic antidiscrimination provision which prohibits discrimination on the basis of race, sex, creed, national origin, and physical handicap. It has been construed as imposing a duty of reasonably accommodation, short of undue hardship. *See King v. Iowa Civil Rights Comm'n*, 334 N.W. 2d 598 (Iowa 1983).

9. Kansas. [State Laws] Fair Empl. Prac. (BNA), p. 453-2801 (May 1, 1978). Requires reasonable accommodation to "Sabbath and other religious holidays" short of undue hardship.

10. Kentucky Rev. Stat. §§ 344.030(5), 434.165(4)(a) (1975). Section 434.165(4)(a), requiring employers to give their employees the day off on the employee's religious Sabbath, is written in absolute language. No reported case has construed or applied it. Section 344.030(5) requires reasonable accommodation, short of undue hardship, to religious observance and practice. *See Kentucky Comm'n on Human Rights v. Kress Bakery*, 644 S.W.2d 250 (Ky. Ct. App. 1982), cert. denied, 103 S.Ct. 3114 (1983); *Kentucky Comm'n on Human Rights v. Commonwealth of Kentucky*, 564 S.W.2d 38 (Ky. Ct. App. 1978).

11. Maine Rev. Stat. Ann. tit. 5, § 4572(1)(A) (1979). This antidiscrimination law requires reasonable accommodation short of undue hardship. *See Maine Human Rights Comm'n v. Local 1881, United Paperworkers Intern. Union AFL-CIO*, 383 A.2d 369 (Me. 1978).

12. Maryland Ann. Code art. 49B, § 15(f) requires reasonable accommodation short of undue hardship. Section 16(h) specifically states that the law does not require preferential treatment. Maryland Ann. Code art. 27,

§ 492, 492(3) is a basic Sunday closing law, requiring that many businesses shut down on Sunday; section 492(3) provides an exception for Sabbatharian owners.

13. Massachusetts Ann. Laws, ch. 151B, § 4.1A (Law Co-op. 1976). Requires reasonable accommodation short of undue hardship.

14. Michigan Comp. Laws, § 37.2101, § 102(1), § 22902, § 292(1)(a). (West Supp. 1984). The sections cited in the Solicitor General's Brief have been repealed; the sections cited herein replace them. Both are antidiscrimination provisions which do not impose on employers any duty of accommodation at all. *See Michigan Dept. of Civil Rights ex rel. Parks v. General Motors Corp., Fisher Body Div.*, 317 N.W. 2d 16, 412 Mich. 610 (1982) (old law); *Wessling v. Krueger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982) (new law). But see [State Laws] Fair Empl. Prac. (BNA), p. 453-1094, (Dec. 12, 1978), adopting EEOC guidelines for Title VII, 29 C.F.R. § 1605.1, requiring reasonable accommodation short of undue hardship.

15. Missouri Ann. Stat., § 578.115 (Vernon 1979). This Missouri law appears absolute. No cases have been found interpreting or applying it. The Missouri anti-discrimination law, § 294.020, imposes no duty of accommodation at all. In applying this section, the Missouri courts have not required that accommodations be made. *See Klein Company, Inc. v. Missouri Commission on Human Rights*, 634 S.W. 2d 497 (Mo. App. 1982).

16. Montana. [State Laws] Fair Empl. Prac. (BNA), p. 455-1091, (July 14, 1983). Adopts EEOC guidelines on Title VII, 29 C.F.R. § 1605.1, requiring reasonable accommodation short of undue hardship.

17. Nevada. [State Laws] Fair Empl. Prac. (BNA), p. 455-2351 (April 6, 1981). Adopt EEOC guidelines for Title VII, 29 C.F.R. § 1605.1, requiring reasonable accommodation short of undue hardship.

18. New Hampshire Rev. Stat. Ann. §§ 354-A:2, 354-A:3(5), 354-A:3(1) (Supp. 1981). A basic antidiscrimination provision; no accommodation requirement.

19. New York Exec. Law § 296.10 (McKinney 1982). Subsection (c) exempts employers from compliance when the employee's presence is "regularly essential" for the "normal performance" of duties or where compliance would otherwise impose an "undue economic hardship." The New York courts have confirmed that the employer's duty is one of reasonable accommodation short of undue hardship. See *State Division of Human Rights et al. v. Clarke v. Carnation Co.*, 86 App. Div. 2d 977, 448 N.Y.S. 2d 339 (1982), cert. denied, 458 U.S. 1194 (1983).

20. Oklahoma. (State Laws) Fair Empl. Prac. (DNA), p. 457:155-04 (Feb. 25, 1977). Requires reasonable accommodation short of undue hardship to Sabbath and other religious beliefs.

21. Pennsylvania Stat. Ann. tit. 43, §§ 955.1(a), (b), (c) (Pardon Supp. 1981). Requires public employers to accommodate their employees' Sabbath observances unless the employee is specifically needed or there is an emergency. Section 955(a) is a basic antidiscrimination provision, containing no accommodation requirement.

22. South Carolina Code Ann. § 1-13-30(k). Requires reasonable accommodation short of undue hardship. Section 1-30-30 is a basic antidiscrimination provision with no accommodation requirement.

23. South Dakota. (State Laws) Fair Empl. Prac. (DNA), p. 457:1754 (Dec. 14, 1979). Requires reasonable accommodation short of undue hardship on employer's business. See § 29:08:10:01.

24. Tennessee. (State Laws) Fair Empl. Prac. (DNA), p. 457:1897 (Jan. 19, 1979). Adopts EEOC guidelines for Title VII, 29 C.F.R. § 1605.1, requiring reasonable accommodation short of undue hardship.

25. Texas Ann. Civ. St. art. 5221k, §§ 1.01, 2.01(1), 5.01 (Vernon Supp. 1984). Requires reasonable accommodation short of undue hardship.

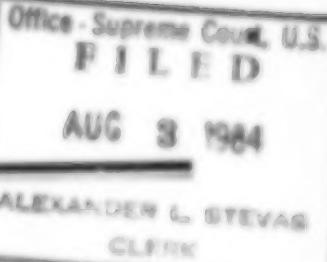
26. Virginia Code, §§ 40.1-29.1, 2, 3 (1981). Section 40.1-29.1 limits workweek to six days per week except in case of emergency. Section 40.1-29.2 provides that, "in accordance with § 40.1-29.1," all nonmanagerial employees—both religious and non-religious—may take Sundays off except in an emergency. Similarly, § 40.1-29.3 permits nonmanagerial Sabbatharian employees to take Saturday off except in an emergency.

27. West Virginia Code, §§ 61-10-25, 61-10-27 (1977). Sunday closing law.

28. Wisconsin Stat. Ann. § 111.807(1) (West Supp. 1983). Requires reasonable accommodation short of undue hardship.

AMICUS CURIAE

BRIEF



No. 83-1138

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ESTATE OF DONALD E. THORNTON,
Petitioner,
v.

CALDOR, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1158

ESTATE OF DONALD E. THORNTON,
Petitioner,
v.

CALDOR, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed with the consent of the parties as provided in Rule 36.2 of this Court's Rules.

STATEMENT OF INTEREST

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") a federation of 95 national and international labor organizations having a combined membership of 13,000,000 working men and women files this brief to argue its position that government may not, consistent with the Establishment Clause of the First Amendment, mandate that in the private sector first priority for securing Sundays as a day of rest—a valuable benefit prized by many workers for secular reasons—must be accorded to those whose claims are grounded in religion.

INTRODUCTION AND SUMMARY OF ARGUMENT

[I]t is common knowledge that [Sunday] has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. [*McGowan v. Maryland*, 366 U.S. 420, 451-52]

Sunday is, accordingly, the "day of rest . . . which most persons would select of their own accord." *Id.* at 352.

The present litigation arises out of the necessity to allocate a hardship—the obligation to perform Sunday work—among a determinate number of persons; the department managers employed by respondent company. The company allocated that hardship according to an entirely neutral standard by directing each of the individuals who was qualified to perform such work to take his turn. Because the stores operated at a reduced capacity on Sundays, the company needed only one-fourth its normal complement of department managers (JA 36a-37a) and its system of rotation required each department manager to work one Sunday in four (*id.* 34a).

Conn. Gen. Stat., § 58-303e(b) forbids this neutral standard and instead requires that an individual be excused entirely from performing Sunday work if he has a *religious* basis for not wishing to do so. Connecticut law thus compelled the company to allocate Sunday work exclusively among individuals who do not have a religious objection, even though (as the record shows here, JA 38a, 42a), they likewise do not desire that work.¹

¹ The situation thus parallels that in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63:

It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most

The Connecticut statute, by exempting religious objectors from Sunday work, will inevitably increase the number of Sundays that must be worked by other employees who, though they may have powerful secular reasons for wishing Sundays off, lack the religious credential necessary to invoke the statutory exemption. The question thus presented is whether Connecticut violated the Establishment Clause by enacting a statute that mandates that in the private sector absolute priority in selecting days off from work must be accorded to those whose claims are based on religion. The Connecticut Supreme Court answered that question "yes," adopting (albeit in different words) the rationale of the district court in *Hardison*: that the statute imposed "a priority of the religious over the secular." See 432 U.S. at 69-70 n.4 quoting 375 F. Supp. 877, 883 (WD Mo. 1974).

It is our submission that the decision below is correct. We begin in Part I by refuting the efforts of petitioner, the State, and the Solicitor General to fit this case into

employees preferred those days off. Allocating the burdens of weekend work was a matter for collective bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. [432 U.S. at 80-81]

The Court concluded that "Title VII [of the Civil Rights Act of 1964] does not contemplate such unequal treatment." *Id.* at 81. Accordingly, the Court did not reach the question whether a broader interpretation of Title VII would violate the Establishment Clause. *Id.* at 70.

the decisions of this Court upholding accommodations relieving religious observers of burdens created in the first place by neutral government regulations. We then show in Part II that the Connecticut statute violates the Establishment Clause because its primary (indeed only) purpose and effect are to aid the practice of religion. Finally, in Part III, we address the implications of the argument, raised for the first time in this Court, that the Connecticut statute is susceptible of a narrower construction that would make the statute constitutional in some of its intended applications.

ARGUMENT

I

The "central purpose of the Establishment Clause" is "ensuring government neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449. The central purpose of the Free Exercise Clause is, in turn, to prevent government infringement of the freedom of religious belief and exercise. *Wisconsin v. Yoder*, 406 U.S. 206, 218-221. Together the two religion clauses mandate that government be neutral, but not hostile, to religion:

[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. [*Everson v. Board of Education*, 330 U.S. 1, 18].

The Court has therefore "enforced a scrupulous neutrality by the State, as among religions, and also as between religions and other activities. . ." *Board of Ed. v. Roemer*, 426 U.S. 736, 745-746 (plurality opinion). But in the nature of things "a hermetic separation of the two is an impossibility." *Id.* at 746. For though the government enacts general legislation in pursuit of wholly

secular objectives, that legislation will sometimes adversely affect some citizens' ability to practice their religion. If in that circumstance government makes no accommodation to neutralize that impact on religion, the values captured in the Free Exercise Clause are implicated.

In some instances, the governmental interest in imposing its general legislation on religious objectors has been so slight, when balanced against the extent of the intrusion on religion, that this Court has concluded that the absence of an exemption for religion contravenes the Free Exercise Clause. See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *Wisconsin v. Yoder*, *supra*; *Thomas v. Review Board*, 450 U.S. 707. But this Court has not regarded those instances as the only ones that bring the values stated in the Free Exercise Clause into play. Rather, there are additional instances in which government has discretion to determine whether, and if so to what extent, to adjust its general secular legislation to account for "free exercise values." See, e.g., *Walz v. Tax Commission*, 397 U.S. 664; *Gillette*, *supra*, 401 U.S. at 453; *Braunfeld v. Brown*, 366 U.S. 599, 608 (dictum).

This "play in the joints" (*Walz*, 397 U.S. at 669) is not (as petitioner and his supporters would have it) founded on a principle that it is a permissible primary objective of government to mandate religious accommodation. It is, rather, a recognition that in some instances government cannot enact secular legislation without incidentally but significantly affecting the practice of religion, that when there is such an effect a decision must be made either to accommodate or infringe on religion, and that accommodation is consistent with the value, fostered by the religion clauses, that government not be the "adversary of religion" (*Everson*, 330 U.S. at 18):

Quite apart from the question whether the Free Exercise Clause might require some sort of exemption,

it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience" . . . "Neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from one of its duties . . . [Gillette, 401 U.S. at 453-454].²

The paradigm example is furnished by laws mandating military conscription. When Congress decides upon a military draft, its purposes are of course wholly secular. But that decision, once made, compels Congress to a second-level decision respecting claims of conscientious objectors. And in *Gillette* the Court concluded that Congress has the power to exempt such objectors from military service and reached that conclusion without passing on whether Congress is required by the Free Exercise Clause to grant such an exemption. 401 U.S. at 453.

Congress in exercising that discretion does not offend the command that its legislation have a secular purpose and a primary secular effect. *Lemon v. Kurtzman*, 403 U.S. 601, 612. The primary purpose and effect of the draft law is secular; the choice respecting the impact of that secular law upon religion is an inevitable,

but incidental, responsibility flowing from the initial decision to enact that purely secular law.³ All of the cases in which this Court has sanctioned accommodation have arisen in the context in which the legislature determines to relieve religion of the burden imposed by a law adopted for entirely secular purposes.⁴

The context that has generated these accommodation decisions is not present in the instant case, and the rationale that justifies upholding such accommodations does not apply here. Connecticut had taken no secular action that collided with the religious practices or beliefs of its citizens. To be sure, it was the repeal of Connecticut's Sunday Closing Law that created for the first time the possibility that those who observe Sunday as their Sabbath might have to work on that day. See p. 11, *infra*. But that repeal simply left the private sector free of a state-imposed limitation. That freedom is not the equivalent of an affirmative state law that *itself* has a negative impact on religion—the laws that have generated this Court's accommodation decisions. That being so, this is not a situation in which government action having an adverse effect on religion needs to be ameliorated by exempting religion from the government-imposed burden. The accommodation challenged here was not a second-level decision rendered necessary by a law enacted for

² In *Zorach v. Clausen*, 343 U.S. 306, much cited on petitioner's side, the Court upheld an exemption from state-compelled school attendance for those wishing to attend religious instruction or devotional services because, in the words of the *Zorach* Court: "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence." *Id.* at 314, emphasis added. Moreover, whereas the Court in *Zorach* stressed that the record provided no evidence of "coercion" (343 U.S. at 311), the Connecticut statute, which compels the grant of a preference to Sabbath observers, is coercive in the most fundamental sense.

³ Of course, if Congress chooses to accommodate some religious beliefs but not others in making this second-level decision, there must be secular reasons for the distinctions Congress draws. *Gillette*, 401 U.S. at 452-453.

⁴ In most of these cases, the consideration leading to accommodation has been the desire to avoid governmental hostility to religion. But in some instances other values emanating from the First Amendment have dictated that course, e.g., "[t]he importance of avoiding persistent and potentially frictional contact between governmental and religious authorities" that would result were religious organizations not exempted from property taxes. *Roeper*, 426 U.S. at 748, n.15, citing *Walz*, 397 U.S. at 674-675.

secular purposes. Here, Connecticut reached out—into a field in which the State was not otherwise involved—for the sole purpose of placing the weight of the State behind facilitating religious exercise. Religion is the primary focus of this law.*

Indeed, were the “governmental accommodation” cases transferable to the private sector, as petitioner and his supporters propose, the consequence would be quite startling. That thesis would validate legislation requiring of the private sector any or all of the accommodations to religion that government may permissibly make in the context of its own secular general legislation, and *a fortiori* all of those that are compelled of government in the latter context by the Free Exercise Clause. Businesses that allow discounts to certain charitable organizations could be compelled to allow discounts to churches (cf. *Walz*, 397 U.S. at 672-74); employers could be obliged to exempt workers from any work requirements that conflicted with their religious scruples (cf. *Gillette*); employers who require their employees to work in remote areas could be compelled to conduct reli-

* The only reference in this Court’s opinions that lends the slightest support to petitioner’s attempt to transport this Court’s “government accommodation” decisions to the issue presented here appears in Justice Marshall’s dissent in *Hardison*, 432 U.S. at 90-91:

If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer.

With respect, we suggest that the considerations advanced to this point show that the equation is not warranted. (The observation in *Hardison* did not, in Justice Marshall’s view, resolve the issue presented in the instant case, for he also observed in that dissent that “important constitutional question would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer” (*id.* at 90), and that he was not proffering an answer to those questions (*id.* at 90 n.3)).

gious services on their premises and even furnish paid chaplains to conduct those services (cf. *Abington*, 374 U.S. at 226, n.10); employers and unions that negotiate supplemental unemployment benefits for those involuntarily unemployed could be compelled to extend those benefits to religionists unemployed because unwilling to take available jobs that conflicted with their religious beliefs and practices (cf. *Sherbert, Thomas*); this list could be multiplied a dozen-fold.

II

Our showing to this point is that the answer to the issue posed here cannot be derived from this Court’s “government accommodation” decisions. We now show that the answer is readily derived from other decisions of this Court stating the meaning and scope of the Establishment Clause.

The fundamental tenet of the Establishment Clause is that government cannot pass laws “which aid one religion, aid all religions, or prefer one religion over another.” *Everson*, 330 U.S. at 15. “[T]he State must confine itself to secular objectives, and neither advance nor impede religious activities.” *Roemer*, 426 U.S. at 747 (plurality opinion). A state law is invalid if “its purpose . . . is to use the State’s coercive power to aid religion.” *McGowan v. Maryland*, 366 U.S. at 453. The first two prongs of the well-established *Lemon* test (and the only ones which we need discuss) are designed to determine whether government has respected that tenet:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [*Lemon*, 403 U.S. at 612.]⁷

⁷ The third prong, and the only one which has occasioned controversy within the Court (see, e.g., *Roemer*, 426 U.S. at 768-69 (White, J., concurring in judgment)), is that “the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon*, 403 U.S. at 612.

Petitioner and his supporters contend first that the Lemon factors should not be applied in evaluating the statute here, and second, that if the Lemon factors are applied, the statute has the secular purpose and effect of prohibiting religious discrimination. We address these contentions in reverse order, for we believe that a full discussion of the second facilitates proper analysis of the first.

A. It is virtually acknowledged in this case that the Connecticut statute does not have a secular legislative purpose, and that its primary effect is to advance religion. In the words of the Solicitor General:

[T]he very purpose of the challenged program is to accommodate religious beliefs and to make it possible for our people to exercise their religion . . .

* * * *

[T]he effect of [this] provision is . . . —by definition—to aid the practice of religion. [U.S. Br. 26, 27].

See also Pet. Br. 22; Conn. Br. 11.

These acknowledgements are entirely correct. The Connecticut statute compels sacrifices by fellow employees, and conceivably by employers, for the sole objective of enabling religionists to "observe their Sabbaths." The government thus has entered the private sector exclusively to aid religion. And that in essence is what the Establishment Clause was designed to forbid. See pp. 4, 9, *supra*.

It is suggested in some of the briefs that the aid to religion in this case is "benign", and that the principal effect of the statute will be to facilitate worship by unpopular minorities. U.S. Br. 30; Conn. Br. 26. It should be a sufficient answer that the Establishment Clause does not leave room for the courts to weigh the

virtues of particular instances of governmental aid to religion and uphold those that seem desirable; indeed, "the risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude." *United States v. Lee*, 455 U.S. 252, 263 n.2 (Stevens, J., concurring). But the plain fact is that the statute in question is not benign in Establishment Clause terms.

In the first place, it is unmistakably clear that the statute was enacted to assist those whose Sabbath is Sunday, not the minorities whose Sabbath falls on another day. For centuries, until Connecticut repealed its Sunday Closing Law, Sunday-observers did not confront the risk of having to work on their Sabbath. But those whose Sabbath falls on other days did face that risk. Yet throughout that long period Connecticut had no law entitling workers to absent themselves from work on their Sabbath. It was the contemplated repeal of the Sunday Closing Law that triggered this statute, and the objective of its proponents was clearly stated. As the Brief for the United States acknowledges (at 13), the statute was enacted because "[s]ome representatives had expressed concern that some Sunday Sabbath observers might be forced by their employers to work on Sundays under the new law" (emphasis added). And the State's brief contains this characterization of the statute's purpose:

Opponents of repeal feared that abolition of the Sunday closing laws would mean that pressure would be put upon employees to work in violation of conscience . . . Section 53-303e was introduced to protect employees from such pressure. [Conn. Br. at 5a]

The State's brief continues: "Once § 53-303e had been added, the Connecticut General Assembly . . . passed a bill repealing the state's Blue Law." *Id.* at 6a.

To be sure, the statute by its terms protects all Sabbath observers.⁶ But to characterize the statute as "reflect[ing] . . . an admirable tolerance for the diversity of religious practices in this country and a willingness to enable religious believers—particularly those of minority views—to overcome the burdens their religious observances would otherwise place on them in the workplace" (U.S. Br. 30) is to blink reality. The statute was enacted by a body consisting predominantly of Sunday-observers out of concern for the interests of Sunday-observers, and it is evident that the vast majority of Connecticut citizens who will benefit from the law are Sunday-observers. This is a classic instance of "a majority . . . us[ing] the machinery of the state to practice its beliefs" (*Abington School District v. Schempp*, 374 U.S. 203, 226) and exemplifies one of the evils against which the Establishment Clause protects: that "powerful sects or groups" will pressure government to act to facilitate their religious practices (*id.* at 222).

Second, the Connecticut statute confers a valuable benefit on Sabbath observers only and extends no similar benefit to "others who ha[ve] strong, but perhaps nonreligious, reasons for not working on weekends." *Hardison*, 432 U.S. at 81. The State may not thus "single[] out a class of citizens for a special economic benefit" along religious lines. *Sloan v. Lemon*, 413 U.S. 825, 832.

Third, the statute creates an incentive to religious devotion. To observe the Sabbath is one of the Ten Commandments. *Stone v. Graham*, 449 U.S. 39, 42. Those who wish to qualify for the benefit Connecticut has fashioned for Sabbath observers are afforded a substantial

⁶ Even this surface neutrality between religions can be deceiving. Because Sunday is the preferred day-off of most workers (see p. 2, *supra*), that is the day on which it is least likely that fellow-workers would be willing to fill the gap voluntarily, and thus the day for which statutory protection is most likely to be valuable.

inducement to obey that Commandment. Cf. *United States v. Lee*, 455 U.S. at 264 n.3 (Stevens, J., concurring).

While acknowledging that the purpose and the effect of the Connecticut statute are to aid religion, petitioner and his supporters attempt to bring the statute within *Lemon* by contending that government pursues a secular purpose (and achieves a secular effect) by forbidding private employment discrimination, and that the statute at issue here is simply an "anti-discrimination" statute. Pet. Br. 28-31, see also, *id.* at 24-25; Conn. Br. 24-29; U.S. Br. 26. With the first proposition we fully agree: as we explain in the margin, a state is free under the Establishment Clause to forbid discrimination (i.e. denial of equal treatment) on the basis of religion, and even to require the elimination of adverse effects on observers so long as this is done without burdening non-

* Subject only to conceivable preemption considerations under the NLRA, a state is free to enact legislation that eliminates irrelevant barriers to employment from the workplace, i.e. barriers that are not justified by some interest of the employer and/or fellow employees. Presumably, a state could enact a statute forbidding discharge from employment "except for just cause." Short of that, the state is free to single out some irrelevant factors as impermissible grounds for employment decision-making. Laws requiring equal treatment regardless of race, religion, sex, etc., are neutral, secular laws that eliminate certain irrelevant factors from the workplace. (Of course, in the limited circumstances where those factors are not "irrelevant," e.g. the religion of priests, the state's intervention would almost surely be unconstitutional.)

Beyond mere insistence on equal treatment, the state is presumably free to eliminate work requirements that, though fair in form, fall more heavily on one race, sex or religion and lack rational justification in the form of some interest of employers and/or fellow employees that would be compromised by their elimination. See, e.g., *New York Transit Co. v. Beazer*, 449 U.S. 568, 587 & n.31. For example, an employer who forbade the wearing of hats, and who had no business reason for the prohibition (such as a safety concern), might be compelled to "accommodate" an employee whose religion required that he be hatted at all.

observers.⁹ But to label a requirement that fellow employees surrender their equal right to Sunday off in order to accommodate petitioner's religious views an "anti-discrimination" statute is to drain that phrase of meaning, indeed, to invert its ordinary meaning.

As this Court observed in *Hardline*, to accord employee A a shift preference over other employees because of A's religion constitutes "unjust treatment." 432 U.S. at 81 (emphasis added). This Court found it "anomalous" to suggest that Congress could have intended such a result by a statute whose "repeated, unequivocal emphasis . . . is on eliminating discrimination in employment." *Id.* "[W]e will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *Id.* at 85 (emphasis added). The Connecticut statute is certainly not "benign" to those employees who will be required to work on Sunday in order to take the place of the Sabbath observers to whom the statute gives an absolute preference.

Torturing the English language cannot obscure the simple truth that a statute requiring some employees to sacrifice work schedule preferences, or employers to incur added costs, for the precise purpose of enabling other employees to observe their Sabbath, is not a neutral, secular statute, and does not share the status under the Establishment Clause of one that simply forbids the denial of equal treatment on account of religion.

B. The insistent plea of petitioner and the United States that the secular purpose and effect requirements

⁹See, (Cf. *Hardline*, 432 U.S. at 88 (Marshall, J., dissenting)). In the absence of a legitimate justification for an employer's refusal, it would be difficult to escape the conclusion that the employer was motivated by religious hostility (and thus subject to sanctions); but even without such a finding, the compelled surrender of that unjustified ground for refusal constitutes the removal of arbitrary barriers to employment—a neutral act in itself.

of *Lemon* not be adhered to here (Pet. Br. 19-27; U.S. Br. 24-30) is understandable, given their acknowledgements that the Connecticut statute promotes religious exercise. But that a statute fails that test impeaches the statute, not the test. Indeed, as we have demonstrated, the statute here suffers from the very evils that the Establishment Clause was adopted to prevent and that the *Lemon* test was designed to identify. The only rationale proffered for ignoring the *Lemon* test in this instance is that the test inhibits validation of statutes designed to prohibit "discrimination." But as we have shown (p. 13 & n.9) prohibiting discrimination—in the normal and proper sense of that term—is a secular purpose, and no reworking of the *Lemon* test is necessary to validate statutes that have that purpose. Petitioners' problem with the *Lemon* test stems from the reality that the statute at issue here is not designed to prohibit discrimination, but instead is an engine of discrimination.¹⁰

III

There remains one matter that requires discussion. There may be some instances in which the accommodation demanded by this statute could be accomplished without any burden upon either the employer or fellow employees (e.g., where there were sufficient employees willing to work on Sundays to fill the void created by Sabbath observers). On our view of the law, a statute that demanded accommodation where no burden is imposed on others would be constitutional. But until this case arrived in this Court, no party had suggested that this statute be narrowed in that manner, and the record was made without attention to the factual considerations that would be pertinent under such a narrower statute.

¹⁰ Certainly, the fact that there have been rare instances in which this Court has found the *Lemon* test inapposite, see *Lynch v. Donnelly*, — U.S. —, 104 S. Ct. 1355, 1362 (1984), cf. *id.* at 1370-71 (Brennan, J., dissenting), does not mean that this is such an instance.

We do not venture into the thicket of nice questions that are posed by the belated injection of this issue—questions that are outside the concerns that prompted our participation. We note only that drawing the precise line between what is and what is not permitted to government in this area is itself a difficult and delicate task, one that ought not be undertaken in a case in which no party litigated the issue in the state courts and thus in which the concrete facts that should inform this Court in undertaking that task are absent from the record. *Amici curiae* American Civil Liberties Union, *et al.*, suggest that accommodation may be required where no “*undue burden*” is imposed on employers or fellow employees. ACLU Br. 26, emphasis added. What burdens those *amicus curiae* would regard as “*undue*” they do not explicate, although at another point they suggest that “substantial secular concerns such as expense, business dislocation or unfairness to other employees” would be impermissible burdens for government to impose to aid religion. *Id.* at 21.

The “*undue burden*” standard would raise a host of problems: How is it to be determined whether an employee’s interest in not working on his Sabbath is entitled to greater respect or protection than a fellow employee’s interest in sharing the company of his working spouse on Sunday? Is the choice to which the Sabbatarian is put if he must work on Sunday or lose his job more onerous than that of a single parent who cannot work on Sunday because he or she has no one to take care of the children? Does the obligation of one employee to accommodate the religious observance of another include paying for child care so that the parent can perform work which the Sabbatarian refuses? These questions cannot be answered by the smooth device of describing the impact on the “non-observant employees” to

be an “inconvenience[].” Pet. Br. 33. The Constitution provides no standards for weighing one person’s religious interests against another’s secular interests; the Establishment Clause’s point is to pretermit the inquiry altogether.

Thus, insofar as the ACLU formulation suggests that there are *any* burdens that a State may impose as “*due*” in order to aid religion, we believe it does not accurately reflect controlling constitutional principles. Madison’s Memorial and Remonstrance, which this Court has recognized as “one of the cornerstones of the First Amendment’s guarantee of government neutrality toward religion” (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 770-71 n.28), warned against permitting government to “force a citizen to contribute three pence only of his property for the support of any one establishment.” And this Court admonished in *Abington School District v. Schempp*, 374 U.S. 203, 225:

[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, “it is proper to take alarm at the first experiment on our liberties.”

Government has no right to exact *any* monetary cost—“large or small”—from employers to aid religious practice (*Everson*, 330 U.S. at 16) and the ability of fellow employees to choose Sunday as a day of rest is surely no more vulnerable to government usurpation. We believe that it is not a proper function of government—and thus not a proper function of the courts—to adjudicate some sacrifices so small that they can properly be demanded by government where the purpose is to aid religion.

CONCLUSION

For the foregoing reason the decision below should be affirmed.

Respectfully submitted,

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**REPLY
BRIEF**

Supreme Court, U.S.

FILED

OCT 23 1984

~~MANFRED L. STEVENS~~

No. 83-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ESTATE OF DONALD E. THORNTON

AND

Petitioner,

STATE OF CONNECTICUT,

v.

Intervenor,

CALDOR, INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of
Connecticut

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PETITIONER'S REPLY BRIEF

—
ARGUMENT

I.

**Respondent has Misstated the Constitutional Issue
Presented on This Record**

If one ignored the record in this case and read only
Caldor's brief and the briefs of the several *amici* who are

supporting Caldor, one might believe that the constitutional ruling of the Connecticut Supreme Court was that Caldor could not be required to undergo severe hardship or impose burdens on other employees in order to accommodate Mr Thornton's observance of Sunday as his Sabbath. Caldor and its supporters direct their fire at Connecticut's "absolutist Sabbath law" (e.g., Caldor Br. 1, 8-12, 15-25; ACLU and Am. Jewish Comm. Br. at 5, 7-8, 16-20; Conn. Retail Merchants Assoc. and Conn. Small Bus. Fed. Br. at 3-7), repeatedly characterizing it, because of its unconditional terms, as coercive (Caldor Br. 8-9, 15, 27-28), disruptive (Caldor Br. 14, n.8, 17-18, 31), and extreme (Caldor Br. 9-15).

But the factual record made below, the legal arguments presented by Caldor to the Connecticut courts, and the *ratio decidendi* of the Connecticut Supreme Court have nothing to do with absolutism, hardship, coercion, and disruption. The case was litigated by Caldor in the Connecticut courts as presenting only three issues:

- (1) Was Mr. Thornton sincere in his belief that Sunday was a day of rest?
- (2) Was his employment involuntarily terminated because he observed that day of rest?
- (3) May a State law constitutionally protect a private employee who observes a religious day of rest?

The first two factual issues were resolved against Caldor by the Board of Mediation. No argument was made to the Board of Mediation, to the Connecticut Superior Court, or to the Connecticut Supreme Court that compelling an employer to undergo "undue hardship" to accommodate to an individual employee's religious needs would be unconstitutional. And no argument was made to the Board of Mediation that there would be "undue hardship" if Mr. Thornton

were accommodated. In short, the "absolutist" nature of the Connecticut law was never a basis for Caldor's constitutional challenge until the case reached this Court.

The Connecticut Supreme Court held that Section 53-303e(b) of Connecticut's General Statutes was unconstitutional simply because it "comes with religious strings attached" (Pet. App. 13a) — not because it is "absolutist" or fails to authorize exemptions for hardship cases. The Connecticut Supreme Court held that the law violates the First Amendment because its "unmistakable purpose . . . is to allow those persons who wish to worship on a particular day the freedom to do so" (Pet. App. 14a) — not because it is "disruptive" and imposes severe burdens on other employees who do not wish to worship on that day.

Now that this Court has taken this case, Caldor would like to restructure the record and try to persuade this Court — with no evidentiary support — that accommodation to Mr. Thornton could not reasonably have been undertaken. But the rule is firmly established by many decisions of this Court — including, most recently, the well-known ruling in *Illinois v. Gates*, 103 S. Ct. 2317, 2321-23 (1983) — that a claim "not pressed nor passed upon" in the state courts may not be asserted here for the first time. The rationale for that doctrine expressed in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), is most appropriate here:

Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.

Could Caldor have presented sufficient evidence to satisfy the Board of Mediation or the Connecticut trial court that accommodation to Mr. Thornton would have been a hardship and would have seriously burdened other employees? We

think not,¹ but we are certain that the proper place to have presented that argument was before the Board of Mediation and in the Superior Court — not by way of speculation and surmise before this Court. Could Caldor's evidence — if it had presented any — have been rebutted? Mr. Thornton is now dead, and he cannot testify as to his personal knowledge of the consequences of an accommodation. If his co-workers are still on the job, their present testimony would surely be affected by the failings of human memory, by the pressures that would now be exerted on them by their employer in this publicized case, and by whatever other motives would influence their testimony at this late date. Thus the suggestion made in one *curious* brief that the case be vacated and remanded for a factual hearing on hardship to be held almost five years after the events in question is ludicrous. Well-established principles of finality in litigation require a party to a lawsuit to present all relevant facts in one evidentiary proceeding. Lawsuits are not to be tried in bits and pieces, encouraging parties to venture extreme constitutional theories in the expectation that they will get other bites at the apple five years later if their initial efforts fail.

A. The "Absolutism" Claim Was Not Made in the Connecticut Courts.

Caldor's brief does not cite any place in the record where Caldor raised in the Connecticut courts the "absolutism"

¹During the hearing before the Board of Mediation, Caldor's counsel acknowledged that the union contract contained a clause stating that "no employee shall be required to report for work [on Sundays or holidays] if working is contrary to said employee's personal religious convictions" (J.A. 47a). Caldor's present assertion that "weekend work is the economic lifeblood of the enterprise" (Caldor Br. 18) is hardly consistent with its readiness to negotiate a labor contract granting the absolute right to rank-and-file employees to be absent on Sundays.

challenge to Section 53-303e(b) that it is now arguing. There is one passing representation in a footnote (p. 43, n. 38) that "at every stage of this litigation Respondent Caldor has raised the argument that the Connecticut Sabbath Law goes beyond the requirements of Title VII." That assertion is flatly and demonstrably untrue.

We have reviewed all relevant portions of the briefs filed by Caldor in the Connecticut courts. At no point did Caldor "raise the argument" that the Connecticut law went beyond Title VII. Indeed, the argument made in the Superior Court was that the Connecticut law "is similar to that found in a portion of the Civil Rights Act of 1964," and that this similarity "is obvious." Brief of Plaintiff, Caldor, Seeking A Vacating of Arbitration Award, No. 232522, Superior Court, Judicial District of Hartford, p. 14. Caldor then proceeded to argue that the federal law had been held unconstitutional in *Drewry v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). It claimed that "the most recent cases have found 701(j) unconstitutional as an illegal intrusion by the government into religious affairs." *Id.* at 16.

In other words, Caldor did not argue that Section 53-303e(b) was unconstitutional because it was "absolute" and lacked the "undue hardship" provision found in Section 701(j). It argued that Section 53-303e(b) was unconstitutional because Section 701(j), which is not "absolute," had been held unconstitutional.

The same line of argument was presented by Caldor in the Connecticut Supreme Court. It argued that the statute was unconstitutional because it "has no clear secular purpose — it is solely to benefit those who observe a Sabbath." Brief of the Plaintiff-Appellant, No. 11002, Conn. Sup. Ct., p. 16. Caldor went on to say that "[t]he primary effect is to

preserve the religious prominence of a holy day; any non-religious effect is only secondary." *Id.* at 17. Caldor's argument was not that statutory accommodation to an individual's religious observance may not be "absolute" or that the Constitution requires that an exception be provided for hardship situations. Instead, Caldor's argument was only that the religious quality of a law that protects Sabbath-observers renders it *ipso facto* unconstitutional. That is, therefore, the only constitutional issue properly before this Court.

B. Constitutional Arguments Not Made in the State Courts May Not Be Raised for the First Time in This Court.

The rule is firmly fixed that in cases coming from state courts, grounds neither pressed by a party nor passed upon by the courts below cannot be asserted for the first time in this Court. See *Illinois v. Gates*, 103 S.Ct. 2317, 2321-23 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 433-35 (1940). See also, e.g., *Foller v. Oregon*, 417 U.S. 49, 50, n. 11 (1974); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *Lent, Inc. v. Adkins*, 395 U.S. 653, 674-75 (1969); *State Farm Mutual Automobile Insurance Co. v. Duerl*, 324 U.S. 154, 160 (1945). This principle applies equally to new grounds offered by a respondent to support a judgment as to new arguments raised by a petitioner or appellant attacking a state court decision. See, e.g., *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940). The rule also applies "whether [the new claim is] one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *Wilson v. Cook*, 327 U.S. 474, 483 (1946) quoting *New York ex rel. Cohn v. Grimes*, 300 U.S. 308, 317 (1937). See *Illinois v. Gates*, 103 S.Ct.

2317, 2321-23 (1983); cf. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 & n. 7 (1982).

Sound policies support the "not pressed or passed upon" rule. The Court recently emphasized in *Illinois v. Gates*, 103 S.Ct. 2317, 2321-22 (1983) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. at 434-35):

[D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

Comity principles apply even when the state court has invalidated its own state's statute on erroneous federal constitutional grounds. The Court has explained (*McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940) (emphasis added)):

In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly, their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned.

In this particular case, policies of comity are highly relevant because this Court cannot know how the Connecticut Supreme Court would have construed Section 53-3X(e)(b) if a constitutional claim based on the statute's "absolutism" had been presented by a factual record and by an explicit constitutional argument. The Connecticut Supreme Court might even have construed the state statute, as a matter of Con-

necticut law, to incorporate an implicit "hardship" exception. Such a ruling would have been beyond the jurisdiction of this Court and might have resolved all the issues now belatedly raised by Caldor. *See, e.g., Lear, Inc. v. Adkins*, 395 U.S. 653, 674-675 (1969).

II.

Connecticut's Enactment of an Additional Anti-Discrimination Law Applicable to Other Conditions of Employment Does Not Warrant Dismissal of the Writ of Certiorari in This Case

Seeking to avoid a decision on the merits, Caldor argues in its brief that Connecticut's enactment in April 1984 of a law tracking Section 701(j) of the Federal Civil Rights Act justifies dismissal of the writ of certiorari because of "new statutory developments" (Caldor Br. 47-50). The new law did not, however, repeal Section 53-303e(b). Nor did it affect the rights at issue in this case. Indeed, the recent enactment makes a decision in this case even more important than it was previously.

Caldor concedes that this case is not mooted by the new law (Caldor Br. 48, n. 42) although it asserts, in a peculiar aside, that "dismissal of the writ would not produce individual unfairness" (Caldor Br. 50).² The new law is a broad statute applicable to many religious practices other than Sabbath observance. It does not replace or effectively supplant Section 53-303e(b) — as is manifest from the fact that the Connecticut legislature did not repeal Section 53-303e(b) when it enacted the new law. Indeed, the relationship between the new law and Section 53-303e(b) was discussed in the Judiciary Committee of the Connecticut

²It is hard to conceive of more "individual unfairness" than to deprive Mr. Thornton's estate of compensation for wrongful dismissal to which he was entitled under a valid State law.

House of Representatives. Representative Tulisano stated that the two laws were "different" (Hearing Before the Committee on Judiciary of the House of Representatives of the State of Connecticut at 59-61 (March 7, 1984)):

Why has one got something to do with the other? . . . [I]t's still in another kind of a section in a different context.

The new law was adopted to overrule a 1972 Connecticut Supreme Court decision that had construed the State's general employment discrimination statute as not requiring any accommodation of employees' religious practices. *Corry v. Arco*, 163 Conn. 309, 322-23 (1972), cert. denied, 409 U.S. 1116 (1973); *See Hearings Before the Committee on Judiciary of the House of Representatives of the State of Connecticut* (March 7, 1984), at 60. It is not, therefore, co-extensive with Section 53-303e(b) either in legislative purpose or in its effect.

This Court has clearly held that where, as here, enactment of a new law (1) does not repeal the statute being reviewed, (2) does not retroactively affect the actual litigation, and (3) does not reach "precisely the same situations that would [be] covered by a decision of this Court sustaining the petitioner's claim on the merits," the Court will not dismiss a writ of certiorari as improvidently granted. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 416-17 & n. 21 (1968). *See also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 & n. 5 (1969).

Moreover, the erroneous construction of the Establishment Clause that led the Connecticut Supreme Court to strike down Section 53-303e(b) would equally invalidate Connecticut's new amendment, as well as all other legislation (including Section 701(j) of the Federal Civil Rights Act) aimed at protecting religiously observant employees

from discrimination in the workplace. See, e.g., Br. of United States as Amicus Curiae at 2, 17, 24-29; Br. of Intervenor State of Connecticut at 17, n.8, 30-35; Br. of Council of State Governments, et al. as Amicus Curiae in Support of the Petition for a Writ of Certiorari at 4-6.¹

Cases cited by Caldar in which this Court has dismissed a writ as improvidently granted because of subsequent statutory developments are inapposite. In *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring), the law upon which petitioners based their claim was repealed and replaced with another statute that "alter(ed) drastically the potential impact of any decision" the Court might have reached. Petitioners had also "almost completely abandoned their original claim for relief" (402 U.S. at 499) and sought a much broader remedy

as to which there was "neither an opinion below nor a record upon which to judge the claim." 402 U.S. at 501-02.

Likewise, in *Sanks v. Georgia*, 401 U.S. 144, 147, 149-51 (1971), the State "repealed virtually the entire statutory scheme" governing the eviction procedures at issue in that litigation and "replaced it with a new one . . . that contain(ed) neither the bond-posting nor double-rent requirement" challenged by tenants on due process and equal protection grounds. And in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), the Court became aware of a state statute that expressly prohibited the very action complained of and provided the same relief in damages sought by petitioner in her constitutional suit. 349 U.S. at 75-76. Consequently, the difficult constitutional issue was no longer presented because a local statute had turned the claim into one that could be fully vindicated under state law.

III.

The Connecticut Law Does Not "Impermissibly Favor Religion Over Non-Religion"

An issue that is presented in this case is whether a state law may entitle a private employee to take Sunday off when his reason for doing so is religious if the law denies that right to another employee who wants the day off for secular reasons, such as a desire to attend a football game or to be with his family. We acknowledge that Sunday is the most sought-after of all days of the week for leisure, and we recognize that giving a religious observer that day off while denying it to the non-religious employee requires an employer to alleviate some burden among its work force. But the assertion made by Caldar and various amici that permitting the observance of religious days of rest (whether on Sunday or on another day of the week) constitutes an impermissible "preference" or "favor" to religion is attenuated for at

¹See *id.* Section 51-35(h)(b) as "aberrational" as Caldar suggests. Several States have passed legislation specifically protecting employees' rights to observe their Sabbath. At least two of them, Kentucky Rev. Stat. § 435.105(4)(a) and Missouri Ann. Stat. § 176.115, protect employee Sabbath observance under per se rules that do not balance free exercise interests against the burdens imposed on the employer or on secular employees. In several other states, laws requiring employers to permit their employees not to work on their Sabbath contain exceptions that are narrower than the "de minimis" burden that Caldar views as the exclusive norm. Caldar Br. at 11, 15 & n. 10, 48. See, e.g., New York Exec. Law § 296.10 (employer must accommodate employee's Sabbath observance unless employee's presence is "regularly essential" for the "normal performance" of duties or where compliance would otherwise impose an "undue economic hardship"); Penn. Stat. Ann., Tit. 43, § 956.1 (Part-time Supp. 1983) (public employers must accommodate employee's Sabbath observance unless the employee is "specifically needed" or there is an "emergency"); Virginia Code §§ 40.1-28.1, 40.1-28.2 (non-managerial Presbyterian employees may take Saturday off except in an "emergency").

least two reasons. First, this contention unfairly magnifies the practical importance of one condition of employment and ignores available means that have long been accepted for distributing day-off privileges among a corps of employees. Second, Caldor's argument overlooks the fact that, by reason of the Free Exercise Clause, recognition of the priority given to religious convictions is an accepted part of the fabric of American life and is not, therefore, a "preference" or "establishment" of religion.

A. Accommodation to Sabbath-Observing Employees Is No More Difficult than Many Other Employee Accommodations Made in the Ordinary Course of Business.

Any private employer is confronted with varying problems of employee availability growing out of his employees' personal circumstances. Employees may be unavailable for work because they are ill, because immediate family members are ill, because they have medical appointments or family obligations, because they suffer deaths in their families, because they are continuing their educations, because they give birth or move to a new home, or because they are involved in any of countless other personal circumstances that make them unavailable at given times. Accommodations are regularly made by employers to various scheduling problems. Sometimes contractual provisions in a collective-bargaining contract govern the rights of the parties, such as negotiated provisions regarding illness, vacations, doctors' visits, maternity leave or other family events. Other personal demands may be arranged on an *ad hoc* basis. And there are many employers who have no prescribed policies to cover various grounds for personal unavailability.

A state law that requires employers to excuse their employees' absences on their Sabbath merely adds one more factor to the many considerations affecting availability that an employer ordinarily administers. The fact that only a

religiously observant employee will be a Sabbath-observer does not make the allocation of the burden of work on his Sabbath more difficult than the allocation of work for a sick employee, a pregnant employee, or an employee whose children are ill or require care. Indeed, the element of predictability involved in Sabbath-observance makes scheduling easier than when an employee is ill or misses work because of a family emergency.

Nor is the assignment of Sunday work inevitably a hardship to other employees. Long before laws protecting Sabbath-observers were enacted, employers and unions had devised incentives for Sunday labor. Payment of double salary for Sunday work is a common phenomenon, and it ordinarily generates enough volunteers that it is unnecessary to force anyone — be he Sabbath-observer or football fan — to work on Sundays.

Moreover, those who refuse, on grounds of religious conviction, to work on their Sabbath, frequently assume undesirable assignments on other days or at other times. It has been customary, for example, for Orthodox Jews who observe Saturdays as their Sabbath to work on Sundays and, if employees are needed, even on Christmas Day. Hence the suggestion in Caldor's brief and those of its *amici* that it is an unalloyed benefit to be permitted to take off one's Sabbath is not consistent with practical experience.

Caldor and its *amici* repeatedly assert that the Connecticut law's purpose is "to aid religion." In fact, the purpose of a law such as Section 53-303e(b) is to prevent individuals from being put to the cruel choice of violating what they believe to be divine command in order to keep food on their families' tables.

Employees are traditionally excused from work when they are ill or have a family emergency because it is unfair

and unreasonable to expect them to report for work when they are physically unable to do so, or when work would seriously jeopardize their health or conflict with extraordinary personal obligations. An employee would be put to a Hobson's choice if he were told that he could retain his job only if he came to work regardless of his health or the welfare of his immediate family. Sick leave is not an encouragement to become ill; it is, rather, a recognition of the fact that an ill employee cannot be expected to work.

By the same token, an employee whose conscience prevents him from working on Sundays or Saturdays or Fridays is put to an intolerable choice if he is told, as Mr. Thornton was, that he may keep his job only if he violates the divine command. If the employee is a true believer, he cannot disregard the command from above because of the earthly directive. The law ameliorates the severe choice that would be imposed on employees who are torn between these contradictory obligations. It is not designed to encourage religious faith or to proselytize.

In claiming that religious observers are given a "preference," Caldor ignores what this Court has often recognized — that conscientious beliefs impose obligations on believers that mere personal preferences (such as a desire to attend a football game or to spend time with one's family) do not. This Court has acknowledged that it is appropriate to spare conscientious individuals a "painful conflict" between secular demands and obedience to what they deem to be a higher authority. See *Gillette v. United States*, 401 U.S. 437, 453, 454 (1971); *Wisconsin v. Yoder*, 406 U.S. 205, 210-13, 216, 218-19 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404, 406, 410 (1963).

Caldor's complaint is essentially that in the pursuit of a constitutionally valid purpose — protecting the equal employment opportunities of religious employees — the state legislature has assigned some cost or inconvenience to employers and co-workers. This does not render Section

53-303e(b) unconstitutional. In contexts where the Establishment Clause is not at issue, "[i]t is . . . well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), subject only to the requirement that they not be "arbitrary and irrational." *Id.*¹ See *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955). That reasoning applies to Section 53-303e(b) because the statute compels no one to violate any religious belief and is not, therefore, within the zone of the "core evils" at which the First Amendment is directed. Its effect on employers is, at most, to add some expense to the conduct of their businesses.

B. The Priority Given to Religious Values by the First Amendment Extends Beyond the Rights Against Government Guaranteed by the Free Exercise Clause.

Caldor and its *amici* err in asserting that the accommodations to individual belief that have been constitutionally mandated in a number of cases under the Free Exercise Clause are wholly inapplicable to state regulation of private employers (Caldor Br. 25-28; AFL-CIO Br. 5-7; Equal Employment Advisory Council Br. 27-30). It is, of course, true that in imposing their own requirements on public employees, government agencies are bound by the Free Exercise Clause, and it is also true that that Clause grants no rights against private action. But the Free Exercise Clause embodies values that local legislatures are free to encourage and enforce within their own jurisdictions.

¹It is significant for Establishment Clause purposes that the consequences of Section 53-303e(b) "[do not] abridge any other person's religious liberties." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). Nothing in Section 53-303e(b) requires other employees to violate their own religious convictions. And an employer remains free to reduce its operations on weekends, if necessary, in order to assure all its employees one weekend day off.

The Free Exercise values enshrined in the First Amendment go beyond freedom from government interference. They reflect our national tradition and ongoing commitment to assuring the "fullest possible scope of religious liberty and tolerance for all. . ." *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *id.* at 227 (Douglas, J., concurring). See *Lynch v. Donnelly*, 104 S.Ct. 1355, 1361 (1984); *id.* at 1371 (Brennan, J., dissenting); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). This Court has, therefore, recognized an area of *permissive accommodation*, where a legislature may act in its discretion to protect individual Free Exercise opportunities even if it is not required to do so by the First Amendment. See, e.g., *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.") The cases involving permissive accommodation have not "balanced" the Establishment Clause against the Free Exercise Clause, as Caldor suggests. See Caldor Br. 27. To the contrary, the Court has treated Establishment Clause limitations as distinct from Free Exercise requirements, and concluded that "[q]uite apart from . . . whether the Free Exercise Clause might require some sort of exemption," the government can legitimately act to "accommodate free exercise values." *Gillette v. United States*, 401 U.S. 437, 453 (1971).

This Court has embraced the principle of accommodation in a variety of contexts in which a government-imposed burden on free exercise was not a factor at all. For example, in the seminal case of *Zorach v. Clauson*, 343 U.S. 306, 312-14 (1952), the Court upheld special treatment for religious students to release them from public school attendance during prescribed hours so that they could attend off-campus religious centers for religious instruction and worship. There was no suggestion that absent such a program,

compulsory school attendance would infringe upon the free exercise of religion.

In short, the values of the Free Exercise Clause are permissible guidelines for state legislative action in the area of private employment. The Free Exercise Clause, by its own terms, grants religion a preferred status, just as the Speech, Assembly and Press Clauses of the First Amendment acknowledge the higher role that freedom of expression plays in our democratic society. A state legislature is not, therefore, constitutionally barred from implementing these values by ameliorating or removing privately imposed restraints or inhibitions on the ability of individuals to live their lives in accordance with their religious convictions.¹

Caldor also asserts, for the first time, that the Connecticut statute is preempted by Title VII (Caldor Br. 45-47). Since this statutory presumption argument was never presented or passed upon in the state courts below, it is not properly before this Court. See pp. 6-8, *supra*. Moreover, *TWA World Airlines, Inc. v. Hardison*, 432 U.S. 64 (1977), upon which Caldor relies, did not address what an employer could *not* do under Title VII. That case dealt only with what Title VII *required* an employer to do under the statute's "reasonable accommodation" provision. See 432 U.S. at 63 (emphasis added) (question before Court is "the extent of the *required* accommodation"); 432 U.S. at 75, 77, 79, 81, 85. Were Caldor's presumption claim valid, numerous state laws that require more than *de minimis* accommodation would be outlawed. Nor is there any evidence that the federal statutory scheme, which contemplates joint federal and local enforcement of antidiscrimination protections, was intended to translate uniform national requirements for antidiscrimination laws. See, e.g., *Johson v. Railrey Express Agency, Inc.*, 421 U.S. 454, 459 (1975), quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974) ("[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws . . . relating to employment discrimination.").

CONCLUSION

For the foregoing reasons and those stated in our principal brief and the briefs of the intervenor and the *amicus* supporting petitioner, the judgment below should be reversed.

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**REPLY
BRIEF**

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ALEXANDER L. STEVENS
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ESTATE OF DONALD E. THORNTON,

Petitioner,

v.

CALDOR, INC.,

Respondent.

On Writ of Certiorari
to the Supreme Court of Connecticut

REPLY BRIEF FOR INTERVENOR
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Respondent.

On Writ of Certiorari
to the Supreme Court of Connecticut

REPLY BRIEF FOR INTERVENOR
STATE OF CONNECTICUT

ARGUMENT

I.

THE DECISION OF THE CONNECTICUT SUPREME
COURT INVALIDATING SECTION 53-309
IGNORES AND CONTRADICTS THE HOLDINGS
OF THIS COURT DEFINING THE SCOPE OF
APPROPRIATE GOVERNMENTAL ACCOMMODATION
OF RELIGION

The Connecticut Supreme Court held Section 53-303e unconstitutional because, in that court's view, any governmental accommodation of the religious needs of sabbath observers intrinsically violates the purpose-effect-entanglement test applied by this Court in Establishment Clause cases. In its brief, however, the Respondent ignores the *ratio decidendi* of the court below, and advances in its place an argument (not made or considered below) based upon the Respondent's assertion (unsupported by the case law or the record in this case) that Section 53-303e confers upon sabbath-observing employees an "absolute" right to stay away from work on their sabbath.

Because the Respondent abandons the reasoning of the Connecticut Supreme Court, it fails to address directly the

detailed challenge to that reasoning offered in our initial submission to the Court. Therefore, we will not burden the Court by developing our argument here. However, in the process of recharacterizing the attack against Section 53-303e, the Respondent does make two points relevant to our earlier argument which we will address.

(a) This Court's Decisions Upholding Governmental Accommodation of Religion Are, in Fact, Relevant to This Case

The Respondent argues that cases like *Shoeless Joe Jackson*, 374 U.S. 398 (1963); *Ward...v...Tenn...Commission*, 397 U.S. 664 (1970); *Gallilleo...v...Boaled...Sisters*, 401 U.S. 437 (1971); *Missouri...v...Tolle*, 406 U.S. 205 (1972), and *Trotter...v...District Board*, 450 U.S. 707 (1981), each of which validated a governmental accommodation of religion, are inapplicable to this case.

because, unlike this case, those cases (at least as the Respondent reads them) turned on the Free Exercise Clause -- "the fundamental First Amendment principle of avoiding substantial coercion of religion." Respondent's Brief at 25 (emphasis added). The Respondent implies that, because (in its reading) the accommodation cases involved the Free Exercise Clause, the strictures imposed by the Establishment Clause were relaxed. Id. Here, the Respondent argues, where the Free Exercise Clause is not involved (because the burden on religion is imposed by a private employer), those strictures are not relaxed.

The Respondent's argument distorts the law by blurring the distinction between cases involving an accommodation

of religion and those permitting such accommodation. As we note in our principal brief, this Court has held that, taken together, the Religion Clauses forbid certain accommodations of religion by government, require others, and permit still others. Intervenor's Brief at 9-11. Sherbert, Yoder, and Bobbs are cases where the Court held that accommodation was required. Walz and Gilligan are cases where the Court held that accommodation was permitted, but not required. The Respondent is wrong when it asserts that all of the cases validating an accommodation of religion turned on the Free Exercise Clause. That Clause either applies (and requires accommodation) or does not. The Court did not find that there was a Free Exercise Clause right to the exemptions

in Walz and Gillette; thus, the Free Exercise Clause did not govern those decisions. What the Court did hold was that, in those cases, the Establishment Clause did not prevent the government from accommodating religion if it chose to do so.

The Respondent's failure to appreciate the distinction just made infects its attempts to distinguish the Court's decisions upholding accommodation from this case. For example, the Respondent argues that the cases where the Court has permitted accommodation all involved "exempting religious people or religious entities from coercive ~~government requirements~~ requirements." Respondent's Brief at 25 (emphasis in original). According to the Respondent, this case is different because it would exempt the

sabbath observer from a requirement imposed by a private party (the employer). This distinction is invalid. Even the Respondent appears to concede that the Establishment Clause does not require the invalidation of Title VII's religious accommodation provision. See, infra, Respondent's Brief at 24 n.21. And, of course, that provision is directed at requirements imposed by private parties (again, employers).

The Respondent also attempts to distinguish the Court's decisions upholding accommodation from this case on the ground that here Connecticut requires a specific citizen, the employer, to bear the burden of providing the accommodation, whereas in the cases upholding accommodation the government did not (in the Respondent's view) ask a

private party to pay the price of accommodation. This distinction is also invalid. Title VII, a statute which the Respondent finds acceptable, requires identifiable private parties to bear the burden of accommodating religious belief. Indeed, each and every accommodation approved by this Court imposed some kind of burden upon private individuals. For example, by permitting the government to exempt conscientious objectors from the draft, the Court validated a program which imposed upon private citizens who were willing to fight (but who would not have been drafted absent the exception of others as conscientious objectors) the burden of going to war.

The issue in this case is whether Section 53-303a is a permitted

accommodation of religion or a forbidden one. It is permitted unless the Establishment Clause forbids it. On this question, the prior decisions of this Court are instructive. This Court has said expressly that the Establishment Clause does not prevent the government from accommodating sabbath observers (and sabbath observers only) by exempting them from Sunday closing laws. *Brennan v. Brown*, 366 U.S. 999, 608 (1961); *Academy Deseret v. Stotts*, 366 U.S. 999 (1962). And, it has held that, notwithstanding the Establishment Clause, the government is required to provide unemployment benefits to sabbath observers who quit their jobs because they are asked to work on their sabbath -- even where unemployment benefits are denied to other workers who quit their

jobs for deeply held personal (but non-religious) reasons. Sherbert.

NUKE: Thus, it is telling that the strictures of the Establishment Clause are no more severe in this case than in Brennan, Alcolea, Dobbs, Block, or Sherbert. And the accommodation of sabbath observers in Section 53-303a does no more to "establish" sabbath observance here than did the accommodations approved in those cases. Indeed, the identification of government with religion (the central concern of the Establishment Clause) is less direct in a case, such as the one at hand, where it is a private party who accommodates religion rather than the government itself.

(b) Section 50-303a Does Not
Impermissibly Entangle
Government and Religion.

The Respondent claims that Section 50-303a "entangles the Government in excessive investigation and monitoring of religious observance." Respondent's Brief at 36. The Respondent apparently objects to two inquiries arguably required by Section 50-303a: the inquiry into the employee's sincerity, and the inquiry into whether the employee's practices constitute a "sabbath" for purposes of the statute.¹⁷

17. The Respondent also suggests that excessive entanglement flows from the allocation of decisionmaking under the statute to an administrative board, the Connecticut Board of Mediation and Arbitration, "with no distinctive expertise concerning such sensitive issues." Respondent's Brief at 38. It is unclear just why in the Respondent's

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It has long been clear that some inquiry into the sincerity of claimed religious convictions is permissible, so long as no inquiry is made into the

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view the Board is less qualified to administer a religious-based exemption than a state unemployment board, *see Sherbell, SUPER*, a selective service board, *see Gillette, SUPER*, or a court. Administrative agencies and courts are often faced with the task of assessing motivations. In this case, the Board is asked to do no more than to decide whether a claimant has a sincere religious objection to working on a particular day.

No less curious is the Respondent's claim that the Board's inquiry "may well include questions about the proper way to observe the Sabbath." Respondent's Brief at 37 n.35. Nothing in the language of the statute or in the opinion of the Connecticut Supreme Court suggests that the tenets of a Sabbath-observing employee must (or may) be tested against those of the employee's sect. Cf., *IBUSSE--Ta Review--Board*, 450 U.S. 707, 715-16 (1981).

truth of those convictions. United States v. Balisard, 322 U.S. 78 (1944). In Balisard, the defendants were convicted of mail fraud for claiming to be divine messengers and soliciting money to further their mission. The Court upheld their conviction, holding that the question of their sincerity was properly submitted to the jury. The premise of the Court's decision was that, although excessive investigation of religious beliefs and practices by secular bodies may present dangers, it is necessary to conduct a minimal inquiry into the sincerity of persons claiming entitlement to an accommodation based on religion in order to safeguard against outright fraud. The Court concluded that such an inquiry is no more difficult than other inquiries into motive which courts often

conduct.

In the years since Bellard, this Court has upheld numerous accommodations that inevitably required an inquiry into the sincerity of religious believers' convictions. See, *Babb, Ibans, Sutter-Gillette, Sutter-Vois, Sutter-Beckel*. See...~~SHARON~~ L. Tribe, ~~SHARON~~ Constitutional....Law 859-65 (1978). Deciding whether an employee claiming the benefits of Section 53-303a believes that he or she must observe a particular day as the sabbath requires no more intrusive an inquiry than does deciding whether the beliefs of a plaintiff under *Ibans-Gillette, Vois, or Beckel* are "religious" within the meaning of those

cases.²⁷ Nothing in the opinion of the court below suggests that the inquiry into sincerity mandated by Section 53-303e goes beyond the limits clearly established by Bellotti. And, the

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27 The scope of the term "Sabbath" in Section 53-303e is not at issue in this case. Certainly nothing in the Connecticut Supreme Court's opinion would lead one to believe that Section 53-303e protects some sabbath observers (for example, those who observe Sunday as their sabbath) but not others (for example, those who keep Saturday as their sabbath). Of course, if the Connecticut courts were to define the term so as to exclude from the statute's protection adherents of non-traditional religions with equally strong religious objections to work on certain days, serious constitutional questions would be raised. Similarly, it is probable that the statute could not be constitutionally interpreted to exclude from its protection those with a strong conscientious belief in a sabbath. Cf. *Gallilio*, 401 U.S. at 447, 450-51. However, the Connecticut courts have not interpreted the statute in either of these two ways.

transcript of the hearing before the Board reflects no undue inquiry into either the truth of Thornton's beliefs or their consonance with the tenets of his sect.

II.

THE RESPONDENT INCORRECTLY
RECHARACTERIZES SECTION 53-303e
AS IMPOSING AN ABSOLUTE REQUIREMENT ON
EMPLOYERS

We have already noted that the Respondent's brief abandons the reasoning of the Connecticut Supreme Court. Instead, it attempts to justify the result reached by the court below by recharacterizing Section 53-303e. In the Respondent's view, by failing expressly to exempt employers who cannot accommodate an employee's religious practices without "undue hardship" (the term used in Title VII), Section 53-303e confers on employees an "absolute and unqualifying" right to designate their Sabbath and to refuse to work on that day. Respondent's Brief at 15 (emphasis in original). The Respondent proceeds to

build its principal constitutional and statutory arguments upon the premise that Section 53-303e is "absolute." Incredibly, the Respondent seeks to justify this premise only in a single footnote. Respondent's Brief at 16 n.11.

It cannot be said on the basis of the decision below (or on the basis of Connecticut case law) that Section 53-303e imposes an "absolute" requirement upon employers. The word "absolute" does not appear in the opinion of the Connecticut Supreme Court. Indeed, since that court's reasoning compelled the invalidation of any accommodation of religious needs...^{2/} that court did not address the question whether Section

^{2/} A careful reading of the opinion of the court below indicates clearly

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53-303a contains by implication an undue hardship defense. The Respondent is wrong to presume that, if forced to resolve that question, the Connecticut court would determine that the statute contains no such provision.

The record reveals that Thornton's

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that that court would have invalidated any accommodation statute, including Title VII. The court reasoned that the statute lacks a valid secular purpose because it purports "to allow those persons who wish to worship the freedom to do so," Pet. App. at 14a; that the statute has a primary effect of conferring a benefit "on an explicitly religious basis," id. at 15a; and that it impermissibly entangles government with religion by requiring secular bodies to inquire into the nature and sincerity of religious belief. id. at 15a-16a. By this reasoning, any accommodation -- including Title VII -- that is not equally available to religious and non-religious employees violates the Establishment Clause.

ability to prove his claim before the Connecticut Board of Arbitration and Mediation and in the Connecticut courts did not turn on whether the statute was "absolute." There is no evidence that accommodating Thornton would have caused Caldor undue hardship as that phrase has been interpreted in the context of similar state and federal statutes. Because Thornton was a managerial employee, Caldor could have replaced him on Sundays without breaching its duties under the union seniority system.^{4/}

4/ In its brief, the Respondent asserts that "weekend work is the economic lifeblood of the enterprise" and concludes, based upon that statement, that Caldor needed to have Thornton work on Sundays. Respondent's Brief at 18. This statement is impossible to reconcile with Caldor's willingness to guarantee that no union employee would have to work on his or her sabbath.

J.A. 37a. Moreover, replacing Thornton would not have entailed paying a higher wage, since all regular employees who worked Sundays were entitled to a time-and-a-half premium. J.A. 48a. Thus, the costs to Caldor of accommodating Thornton's religious preferences would have been de minimis. The only evidence to suggest that Caldor would have incurred hardship by accommodating Thornton consists of testimony by Thornton's supervisor that other Caldor employees had threatened not to work on Sundays if Thornton was given that day off. J.A. 38a, 42a, 44a. In the context of Title VII, however, it is clear that such employee discontent does not rise to the level of undue hardship. *McDaniels v. ESSO Standard Oil Co.*, 696 F.2d 34, 37-38 (6th Cir. 1982);

BERRY v. General Motors Corp., 601 F.2d 956, 960-61 (8th Cir. 1979); Dodge v. General Dynamics Corp., 589 F.2d 397, 402 (9th Cir. 1978), 98-198809, 648 F.2d 1247 (9th Cir. 1981), cert. denied, 454 U.S. 745 (1982). Thus, on this record, Thornton was entitled to an accommodation under Section 53-303e whether it contains an undue hardship provision or not. The Connecticut Supreme Court did not have to decide whether Section 53-303e contains such a provision, and it did not do so. It is wrong for the Respondent to assert that it did.

Faced with the fact that the opinion of the Connecticut Supreme Court did not hold that Section 53-303e is "absolute," the Respondent appeals to "the definitive construction given to the statute by the

state Arbitration Board and the Connecticut courts (whose constructions, of course, are binding on this Court)." Respondent's Brief at 16-17 n.11. In support of its claim that Section 53-303e has been read as "absolute," the Respondent cites a single decision of the state Arbitration Board -- Ga...Fox...&...Co... vs...Binsaldi. Conn. Bd. Arb. & Med. No. 8182-A-440 (Nov. 17, 1982).^{2/} The Respondent asserts that Binsaldi "explicitly reaffirms that Section 53-303e(b) creates an 'absolute right.'" Respondent's Brief at 17 n.11 (quoting Binsaldi). By making this assertion, the Respondent seriously misrepresented

2/ The Respondent refers to Fox as "more recent" than the case at hand. In fact, it was rendered before the decision of the Connecticut Supreme Court in this case.

Rinaldi to the Court.

The Board's decision (which is set out in full in Appendix A) actually was against the employee. And, the facts of the case clearly belie the Respondent's assertion that the Board read the statute as conferring an "absolute" right to sabbath off. When the employee, Rinaldi, refused to work on Sundays (her Sabbath), her employer transferred her to a position which did not require Sunday work. Rinaldi refused to accept the transfer and was discharged. The Board upheld the discharge, holding that when Rinaldi refused to accept her employer's accommodation of her desire not to work Sundays, she no longer was protected by

the statute.^{6/} Thus, contrary to the Respondent's view, [Egg] is best read to mean that an employer must do no more under the statute than "reasonably accommodate" their religious practices.^{7/}

6/ In the course of its discussion, the Board noted that "under the statute, the employee has an absolute right to designate any day of the week as his or her sabbath. The statute does not impose any obligation on the employee to have observed this particular day as a day of rest or a day with any particular significance, religious or otherwise, in the past." The "absolute right" referred to is clearly the right to designate one's sabbath, not the right to have that day off regardless of one's employer's efforts at accommodation. Thus the respondent's quotation of the two words "absolute right" torn from their context, Respondent's Brief at 17 n.11, is seriously misleading.

7/ At an earlier point in this litigation, even the Respondent accepted the fact that Section 30-303a was like Title VII. Indeed, in the trial court, the Respondent

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argued that the provision was "similar to that found in a portion of the Civil Rights Act of 1964." Brief of Plaintiff, Caldor, Seeking a Vacating of Arbitration Award, No. 252522, Superior Court, Judicial District of Hartford, at 14. At that stage of the litigation -- as well as in the Connecticut Supreme Court -- the Respondent's argument against Section 53-303e was based upon the fact that "the most recent cases have found [Title VII] unconstitutional as an illegal intrusion by government into religious affairs." Id. at 16. Nowhere in the proceedings below did the Respondent make the argument that Section 53-303e was "absolute."

III.

**SECTION 53-303e NEITHER VIOLATES
NOR IS PRE-EMPTED BY TITLE VII
OF THE CIVIL RIGHTS ACT OF 1964**

The Respondent makes a convoluted argument purporting to demonstrate that Section 53-303e violates, or is pre-empted by, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. (1982), as interpreted by this Court in *TWA-Ya-Hoodison*, 432 U.S. 63 (1977). Respondent's Brief at 44-47. The argument appears to be that any religious accommodation not required by Title VII is prohibited by it; that Section 53-303e requires Caldor to accommodate Thornton's religious practices in a manner not mandated by Title VII; and that accordingly Section 53-303e violates Title VII. This argument is clearly incorrect. First,

like the Respondent's constitutional argument, it inappropriately presumes that Section 53-303e requires more accommodation than does Title VII. Second, and more fundamentally, the Respondent's reading of Title VII would lead to perverse consequences. For example, were the Respondent's argument to be accepted, Caldor would have violated Title VII if it had voluntarily arranged for Thornton not to work on his Sabbath. Indeed, the Respondent's logic requires the conclusion that its own collective bargaining agreement -- which gives its union employees an "absolute" right not to work on Sundays or holidays "if working is contrary to [their] personal religious convictions" (J.A. 91a) -- violates Title VII.

The Respondent entirely misapprehends the relevance of Title VII to this case. Even assuming *secundum* both of the Respondent's premises -- that whatever accommodation is not required by Title VII is prohibited by it, and that Section 53-303e requires employers to give way to their Sabbatarian employees in all circumstances -- the Respondent's argument does not prove what it sets out to prove. There is no evidence in this case that to accommodate Thornton would have imposed an undue hardship on Caldor. See pp. 19-22, *supra*. Therefore, the accommodation required by Section 53-303e would have been mandated by Title VII. Thus, on the facts of this case, even if the Respondent's contorted reading of Title VII were correct, there was no conflict between Section 53-303e

and Title VII.

If in the future the Connecticut courts interpret Section 53-303e as containing an "undue hardship" exception, any conflict with Title VII would, of course, be moot. If the Connecticut courts interpret Section 53-303e as "absolute" in a case in which Title VII would not require accommodation, the questions raised here by the Respondent might need to be answered. Even on the Respondent's construction of Title VII, however, nothing in it justifies striking down a statute on the basis of speculative applications unconnected with the case at bar.

IV.

THE ADOPTION OF NEW
EMPLOYMENT DISCRIMINATION LEGISLATION
IN CONNECTICUT DOES NOT AFFECT
THE IMPORTANCE OF THIS CASE

In an effort to avoid a decision by this Court on the merits of its argument, the Respondent asserts that the recent adoption of antidiscrimination legislation in Connecticut parallelling the "reasonable accommodation" language of Title VII renders it unnecessary for this Court to decide this case. Respondent's Brief at 47-48. The new law did not repeal Section 53-309a, and the Respondent fails to explain just why the existence of the new law affects the disposition of this case.

The legislative history of the new Connecticut law reveals that the Connecticut legislature did not believe that the new statute affected Section

53-303e, for that history reveals that the Connecticut legislature considered the relationship of the two statutes and concluded that they were different. Far from adopting the new law because it was a "more acceptable" solution to religious discrimination than Section 53-303e (as the Respondent claims, Respondent's Brief at 48), the Connecticut legislature viewed the new law as "still in another kind of a section in a different context." Remarks of Representative Richard Tulliano, Chairman of the Judiciary Committee, Hearings Before the Committee on the Judiciary of the State of Connecticut Legislature, at 61 (March 7, 1984). The new law had the effect of overruling a 1972 decision by the Connecticut Supreme Court which held that Connecticut's general employment

discrimination statute did not require any accommodation of an employee's religious beliefs. *Gorey-Ya-Bygg*, 163 Conn. 309, 322-23 (1972), cert. denied, 409 U.S. 1116 (1973). Hearings Before the Committee on the Judiciary of the State of Connecticut Legislature, at 60 (March 7, 1984).

Whatever the relationship between the new Connecticut law and Section 53-303e, however, a decision by this Court in this case will be valuable. Obviously, only a decision by this Court validating Section 53-303e will vindicate the Petitioner's right to relief. And, more significantly, a decision by this Court in this case will clarify the status of statutes, like Title VII, that are

similar to Section 53-303e.^{8/} If, as we argue, Section 53-303e is similar to Title VII, this case clearly has wide-ranging implications. If, as the Respondent argues, Section 53-303e requires an employer to do more to accommodate religious employees than does Title VII or similar state statutes, it would appear that Section 53-303e provides employment protections to Connecticut workers not covered by the new legislation. In any event, the sweep of the decision below clearly undermines the constitutional foundations not only

8/ Contrary to the Respondent's claim, Section 53-303e is not aberrational. Even if Section 53-303e is read as conferring upon employees an "absolute" right to stay home from work on their sabbath, other states have similar statutes. See, e.g., Kentucky Rev. Stat. Section 436.165(4)(e); Missouri Ann. Stat. Section 570.115.

of legislation granting an "absolute" preference to religious employees, but of all legislation, including Title VII, giving such employees ~~any~~ preference whatever. It remains important, therefore, for this Court to clarify the limits within which the state may require private employers to accommodate the religious interests of their employees.

CONCLUSION

For the reasons given above and in our principal submission to this Court, the decision of the Supreme Court of the State of Connecticut should be reversed.

Respectfully submitted,

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Of Counsel^{1/}

^{1/} Counsel for the Intervenor gratefully acknowledges the assistance of Jonathan H. Hurwitz, a second-year student at New York University Law School, and Richard B. Bernstein, Esq., both of whom aided in the preparation of this brief.

APPENDIX A

APPENDIX A

STATE OF CONNECTICUT
LABOR DEPARTMENT

ARBITRATION AWARD

IN THE MATTER OF:

G. Fox & Company
and
Janet L. Rinaldi

CASE NO. 8182-1-440
AWARD DATE: November 17, 1982
HEARING DATE: April 20, 1982
HEARING LOCATION: Wethersfield, CT

APPEARANCES:

EAC-She-Goodson:
Siegel, O'Connor & Keinen

EAC-Janet-L.-Rinaldi:
Robert L. Fisher, Jr., Esq.

ISSUE: This is an appeal brought pursuant to Section 33-303(e) of the employee's discharge, allegedly for refusal to work on her designated sabbath.

STATEMENT OF THE CASE

The appellant was hired as a cosmetic salesperson in September of 1978 and worked continuously until her termination on January 22, 1982.

In November of 1981, as a result of a growing trend among retailers to operate stores on Sunday, the company announced a new work schedule under which each employee would be expected to work every fifth Sunday.

Shortly thereafter, the appellant announced her refusal to work on Sunday which she designated as her sabbath, under the statute.

On January 14, 1982, the appellant was informed that she was going to be transferred from the cosmetics department and temporarily designated a "contingent" salesperson which meant that she would

fill in in various positions throughout the store on an ad hoc basis.

The appellant refused to accept this transfer and as a result, she was terminated.

DISCUSSION

There is no question that, under the, the employee has an absolute right to designate any day of the week as his or her sabbath. The statute does not impose any obligation on the employee to have observed this particular day as a day of rest or a day with any particular significance, religious or otherwise, in the past.

The employee in this case was not terminated for her failure to work on her designated sabbath but rather for her refusal to work at all, that is, to accept the transfer which was presented

to her by the company.

We are not faced with the question of whether or not the company might lawfully circumvent the statute by shuttling her about the store from one position to another in a manner so as to lower significantly the quality of her workplace, so to speak. Had that been the case, the good faith of the company might well have been called into question.

However, the only evidence before the panel on this score was the offer by the company of a "contingent" position with the promise that when a permanent position became open it would be offered to her. This, without more, can in no way raise an unfavorable inference about the bona fides of the company.

We have, rather, a situation where

the employee stated only that she would work only in the cosmetic department and in no other and, for this reason, she was terminated. We do not find that the termination was as a result of the employee's refusal to work on her sabbath.

AWARD

The appeal is dismissed.

THE CONNECTICUT BOARD OF
MEDIATION AND ARBITRATION

LGL-----
Albert G. Murphy
Public Member

LGL-----
Harold LeRoy
Management Member

LGL-----
Raymond Shee (Dissenting)
Labor Member